Supreme Court, U.S.
FILED
JUN 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

88-13

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1988

LEE WARREN EISENHAUER,
Petitioner,

V.

THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

SAM P. BRADLEY
100 North Main Bldg. #3002
Memphis, TN 38103
[901] 525-8271
Counsel for Petitioner

DAVID D. SILBERBERG
Counsel of Record for Filing
A Member of the Bar of the
United States Supreme Court
100 North Main Bldg. #3002

I.

QUESTIONS PRESENTED

1. WHETHER THE TEXAS COURT OF CRIMINAL APPEALS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT AND DEPARTED FROM THE ACCEPTED COURT OF JUDICIAL PROCEDURE, THEREBY DENYING PETITIONER DUE PROCESS OF LAW BY AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO SUPPRESS?

2. WHETHER THE TEXAS COURT OF CRIMINAL APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT, TO-WIT: WHETHER INFORMATION FURNISHED BY A CONFIDENTIAL INFORMANT, WHO IS NOT PROVEN TO BE RELIABLE, ARTICULATING OTHERWISE INNOCENT ACTIVITY AND ALLEGING THE POSSESSION OF CONTRABAND, IS SUFFICIENT TO CONDUCT A WARRANTLESS ARREST PURSUANT TO ILLINOIS V. GATES, 462 US 213 (1983) AND DRAPER V. UNITED STATES, 358 US 307 (1959).

II.

PARTIES TO THE PROCEEDINGS BELOW

Appellant Below:

LEE WARREN EISENHAUER (Petitioner)

Appellee Below:

THE STATE OF TEXAS (Respondent)

III.

TABLE OF CONTENTS

PAGE

I. QUESTIONS PRESENTED. i

II. PARTIES TO THE PROCEEDING BELOW. ii

III. TABLE OF CONTENTS. iii

IV. TABLE OF AUTHORITIES iv

A. CASES. . . . . .

B. CONSTITUTION . . . . . .

V. DECISIONS BELOW. v

VI. JURISDICTIONAL STATEMENT vi

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. vii

VIII STATEMENT OF THE CASE. vii

IX. ARGUMENT AND REASONS FOR GRANTING OF WRIT. 9

X. CONCLUSION AND PRAYER. 18

XI. CERTIFICATE OF SERVICE 19

XII. APPENDICES . . . . . .
Appendix A a1-a19
Appendix B b1-b56
Appendix C c1-c19
Appendix D d1-d125

IV.

TABLE OF AUTHORITIES

CASES

Aguilar v. Texas, 348 US 108 (1964) . . . . . .

Draper v. United States, 358 US 307 (1959). . . . . .

Eisenhauer v. State, 678 S.W.2d 947 (Tex.Crim.App. 1984). . . . . .

Eisenhauer v. State, ___ S.W.2d (Tex. Crim.App. #0149-85, delivered March 23, 1988) . . . . . .

Florida v. Royer, 460 US 491 (1983) .

Illinois v. Gates, 462 US 213 (1983).

Spinelli v. United States, 393 US 410 (1969). . . . . .

CONSTITUTION

U.S. Constitution, Amendment IV . . .

U.S. Constitution, Amendment XIV. . .

V.

DECISIONS BELOW

This cause has been twice considered by both the Court of Appeals for the First Supreme Judicial District of Texas and the Texas Court of Criminal Appeals.

The first opinion of the Court of Appeals for the First Supreme Judicial District of Texas is reported as Eisenhauer v. State, 657 S.W.2d 184 (Tex.App. - Houston [1st Dist.] 1983) attached as Appendix A, and referred to as "Eisenhauer I".

The first opinion of the Texas Court of Criminal Appeals is reported as Eisenhauer v. State, 678 S.W.2d 947 (Tex.Crim.App. 1984) attached as Appendix B, and referred to as "Eisenhauer II".

The second opinion of the Court of Appeals for the First Supreme Judicial District of Texas is reported as Eisenhauer v. State, 684 S.W.2d. 782 (Tex. App.-Houston [1st Dist.] 1984) attached as Appendix C, and referred to as "Eisenhauer III".

The second opinion of the Texas Court of Criminal Appeals is reported as Eisenhauer v. State, _____S.W.2d _____ (Tex.Crim.App. No. 0149-85, delivered March 23, 1988) attached as Appendix D, and referred to as "Eisenhauer IV".

VI.

JURISDICTIONAL STATEMENT

The judgment of the Texas Court of Criminal Appeals (Eisenhauer II) pertaining to the validity of petitioner's arrest and search incident thereto under the guidelines of the Fourth and Fourteenth Amendments to the United States Constitution was rendered on October 17, 1984.

The judgment of the Texas Court of Criminal Appeals (Eisenhauer IV) pertaining to the validity of petitioner's arrest and search incident thereto under the guidelines of the Fourth and Fourteenth Amendments to the United States Constitution and related state statutes and constitutional provisions was rendered on March 23, 1988. Petitioner's motion for rehearing was denied on April 27, 1988.

There have been no extensions of time within which to petition for a writ of certiorari, and this is not a cross-petition for a writ of certiorari.

This Court has jurisdiction pursuant to 28 USC §1257(3) to review the judgments of the Texas Court of Criminal Appeals by writ of certiorari.

VII.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves violations of petitioner's rights pursuant to the Fourth and Fourteenth Amendments to the United States Constitution. These are set out in their entirety in Appendix E.

VIII.

STATEMENT OF THE CASE

On February 26, 1982, the Grand Jury for the District Court of Harris County, Texas, returned a one-count indictment against petitioner. The indictment charged petitioner with possession of a controlled substance, namely, cocaine. Petitioner's arrest was based on information supplied to the Houston Police Department by a confidential informant, not proven to be reliable.

The informant called the Houston Police Department at 1:00 p.m. on February 16, 1982. The confidential informant, whose reliability was never established at the suppression hearing, told officer D.D. Furstenfeld that an individual by the name of Lee Eisenhauer would depart from Houston Intercontinental Airport at 1:30 p.m. en route to Miami. The informant further revealed that Lee Eisenhauer would return from Miami the same day with cocaine in his possession. The informant gave Furstenfeld a physical description of Lee Eisenhauer and a description of the clothes he would be wearing. (T.Vol 2, June 24, 1982 pp. 6-7).

Furstenfeld left his office in Terminal A of the Houston Intercontinental Airport and went to Terminal C. At the ticket desk in Terminal C, Furstenfeld

learned that an individual named Lee Eisenhauer was booked on a 1:30 p.m. flight to Miami, and was scheduled to return on the same day from Miami at 8:03 p.m. (T.Vol 2, June 24, 1982 pg 8).

On February 16, 1982 at 8:00 p.m. Furstenfeld observed many individuals deplaning and determined that one individual fit the description given by the informant. Petitioner walked through the airport and was approached by officers Burnias and Furstenfeld. (T.Vol 2, June 24, 1982 pp. 10-12.)

Furstenfeld asked petitioner for his ticket and personal identification and told petitioner that he believed petitioner to be in possession of cocaine. (T.Vol 2, June 24, 1982 pp. 25-26.) Furstenfeld requested permission to search petitioner and petitioner's luggage. Petitioner remained si-

lent. Officer Castillo approached petitioner and said that the officers knew he had gone to Miami to buy cocaine and that the officers felt petitioner had cocaine in his bag or on his person. Petitioner stated, "What happens now?" Whereupon Furstenfeld told petitioner that he could consent to a search of his bag and person or require the officers to procure a warrant. At the juncture, the officers were restraining petitioner in a phone cubicle. Appellant's luggage was searched. The officers did not discover contraband. (T.Vol. 2, June 24, 1982 pg. 28.)

Subsequent to a fruitless search of petitioner's luggage, Officer Gannon stated that the cocaine was probably in petitioner's sock. At the same time, Furstenfeld repeatedly asked petitioner where the cocaine was located. Castillo

was urging petitioner to give it up because he was caught. Petitioner continued to be restrained in a phone booth. (T.Vol. 2, June 24, 1982, pp. 27-30.)

While standing in the cubicle, petitioner took his coat off and said: "It's in the pocket." Officer Burnias grabbed the coat and rummaged through one pocket while Furstenfeld searched the left front pocket and discovered a package wrapped in a napkin. Furstenfeld opened the napkin and observed a plastic bag with a white substance contained therein which tested positive for cocaine. (T.Vol. 2, June 24, 1982, pp. 29-30.)

Petitioner filed a motion to suppress alleging that the warrantless arrest was without probable cause pursuant to the Fourth and Fourteenth Amendments to the United States Constitution and related state statutes and constitution-

al provisions. Subsequent to a hearing and the trial court's denial of petitioner's motion to suppress, petitioner entered into a plea bargaining agreement with the State of Texas. On June 24, 1982, petitioner entered a plea of nolo contendere. The trial court found petitioner guilty and assessed punishment at a fine of two thousand dollars and six years' probation. The trial court granted petitioner permission to appeal the denial of his motion to suppress. (T.Vol 1, June 24, 1982, pp. 17-26.)

On August 11, 1983, the Court of Appeals for the First Supreme Judicial District of Texas overruled the trial court's decision and found that petitioner's arrest was not supported by probable cause under the Fourth and Fourteenth Amendments to the Constitution of the United States of America. The Court

of Appeals further held petitioner's consent to search was secured through the exploitation of petitioner's illegal arrest (Eisenhauer I, Appendix A). The State of Texas sought review of the decision in Eisenhauer I.

On January 18, 1984, the Texas Court of Criminal Appeals granted the government's petition for discretionary review. The Texas Court of Criminal Appeals agreed to review whether the Court of Appeals accurately decided Eisenhauer I under the Fourth and Fourteenth Amendments to the United States Constitution.

The Texas Court of Criminal Appeals overruled the Eisenhauer I opinion on October 17, 1984 (Eisenhauer II, Appendix B). The Texas Court of Criminal Appeals held that the proper standard for reviewing probable cause determina-

tions under federal constitutional law was the "totality of the circumstances" rule, as opposed to the two-pronged Aguilar rule. The Texas Court of Criminal Appeals held that probable cause to arrest petitioner existed under the Fourth and Fourteenth Amendments; however, they remanded the case to the First Court of Appeals for consideration of petitioner's other points of error addressing the application of state law.

On December 31, 1984, the First Court of Appeals again overruled the decision of the trial Court and held that under state law, the appropriate standard for reviewing probable cause determinations was the two-pronged Aguilar rule (Eisenhauer III, Appendix C). The State of Texas timely filed a petition for discretionary review. On September 23, 1985 the Texas Court of Crim-

inal Appeals granted the government's petition for discretionary review. The Texas Court of Criminal Appeals agreed to determine whether the two-pronged Aguilar rule should be applied to probable cause assessments as a part of state statutory and constitutional law.

The Texas Court of Criminal Appeals held on March 23, 1988 that the "totality of the circumstances" rule was a part of state statutory and constitutional law. Petitioner's conviction was affirmed (Eisenhauer IV, Appendix D). In light of Eisenhauer II, the appeal was not remanded to the Court of Appeals for further consideration.

Petitioner timely requested a rehearing. Petitioner's rehearing was denied on April 27, 1988. Petitioner filed a motion for leave to file a second motion for rehearding requesting

the Texas Court of Criminal Appeals to address the retroactive application of its decisions under federal and state principles. Petitioner's motion for leave to file his second motion for rehearing was denied on May 11, 1988.

IX.

ARGUMENT AND REASON FOR GRANTING OF WRIT

QUESTIONS PRESENTED:

1. WHETHER THE TEXAS COURT OF CRIMINAL APPEALS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT AND DEPARTED FROM THE ACCEPTED COURT OF JUDICIAL PROCEDURE, THEREBY DENYING PETITIONER DUE PROCESS OF LAW BY AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO SUPPRESS?

2. WHETHER THE TEXAS COURT OF CRIMINAL APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT, TO-WIT: WHETHER INFORMATION FURNISHED BY A CONFIDENTIAL INFORMANT, WHO IS NOT PROVEN TO BE RELIABLE, ARTICULATING OTHERWISE INNOCENT ACTIVITY AND ALLEGING THE POSSESSION OF CONTRABAND, IS SUFFICIENT TO CONDUCT A WARRANTLESS ARREST PURSUANT TO ILLINOIS V. GATES, 462 US 213 (1983) AND DRAPER V. UNITED STATES, 358 US 307 (1959)?

The Court of Criminal Appeals held in Eisenhauer II and IV that the rules articulated in Draper v. United States, supra, with respect to establishing the reliability of an informant, necessary to furnish probable cause for a warrant-

less arrest have been replaced by the "totality of the circumstances" test set forth in Illinois v. Gates, supra. As the dissent in Eisenhauer II correctly noted, this is a momentous decision which should properly be made by the United States Supreme Court.

The Texas Court of Criminal Appeals decisions (Eisenhauer II and IV) radically depart from and directly conflict with this Court's ruling in Draper v. United States, 358 US 307 (1959). While upholding a peace officer's probable cause assessment in a warrantless arrest situation, Draper held that law enforcement officers are entitled to rely upon detailed information furnished by informants with a clearly proven and known history of reliability.

A decisive factor in Draper was the confidential informant's continuous sup-

ply of accurate information to law enforcement authorities regarding alleged criminal activity. The Draper informant's history with respect to prior criminal activity provided a basis for the arresting officer's probable cause assessment. The practical question with respect to whether there was a fair probability that contraband would be found on a particular person at a specified time in Draper, was verified in the officer's mind through the informant's past record of supplying accurate information. In Draper the probability of the law enforcement agent receiving poor information was significantly diminished because the informant was trustworthy, and further reduced by the agent's corroboration of the informant's tip.

This Court in Draper authorized a warrantless arrest based upon an inform-

ant with a strong indicia of trust, extremely detailed facts, and corroboration of those facts by law enforcement authorities. In Gates, this Court further sanctioned an arrest based upon an anonymous informant with no indicia of reliability, extremely detailed facts, and the corroboration of those facts by law enforcement authorities. Gates, however, involved the intervention of a neutral and detached magistrate capable of assessing the probabilities regarding criminal activity and making a commonsense probable cause determination. This Court in Florida v. Royer, 460 US 491 (1983) refused to find probable cause in a warrantless arrest factual situation wherein there was no informant, the facts were based on speculation, and the speculation was corroborated.

The Texas Court of Criminal Appeals (Eisenhauer II and IV), when applying the Gates rule (a search warrant case) substantially departed from Draper for the reason that the reliability of the informant was disregarded. The Texas Court of Criminal Appeals sought to justify its departure from Draper by indicating that the mere substance of a tip, along with corroborative efforts by the police, furnished a substantial basis for Officer Furstenfeld to conclude there was probable cause to arrest petitioner.

The informant's reliability in Eisenhauer II and IV was not considered because Furstenfeld never testified at the suppression hearing with respect to any underlying facts supporting his informant's reliability. Furstenfeld's conclusory statements with respect to

reliability fall short of the requisite showing necessary to establish a trusted and reliable informant. Aguilar v. Texas, 378 US 108 (1964); Spinelli v. United States, 393 US 410 (1969). Gates specifically urges magistrates to consider reliability of an informant as one factor among many when making a commonsense probable cause determination. Draper specifically urges law enforcement authorities to consider reliability and corroboration of the informant's tip as necessary factors when making a warrantless probable cause determination.

Eisenhauer II and IV presents this Court with a probable cause determination made by a tendentious law enforcement officer in the frenzy of pursuing criminal activity. The officer was acting on more information than the officer in Royer but less detailed information

than existed in Draper and Gates. Moreover, the information acted upon by the officer in this cause was furnished by an informant of significantly less stature than the Draper informant, and anonymity one step above Gates. The officer in our case corroborated less than the explicit information found in Gates and Draper and information equal to that in Royer. The questions presented herein are substantial and must be resolved to prevent erosion of probable cause determinations by law enforcement individuals acting without judicial supervision, and to define the status and extent of Draper, and law enforcement activities regarding warrantless arrests in light of Gates.

The decisions of the Texas Court of Criminal Appeals (Eisenhauer II and IV) construing the Fourth and Fourteenth

Amendments permits Texas peace officers to make unbridled decisions with respect to whether the liberty and privacy of individuals should be invaded. This unbridled discretion is limited only by corroborating innocent activity; it is unlimited with respect to a determination of fair probabilities predicated upon the history of the informant furnishing information with respect to criminal activity. The Texas Court of Criminal Appeals construed the Fourth and Fourteenth Amendments to the Constitution in a manner that conflicts with the decisions of this Court, and radically departs from Draper v. United States, supra. The Texas Court of Criminal Appeals has decided an important question of federal law, whether Illinois v. Gates, supra, overruled Draper v. United States, supra, which has not been but

should be settled by this Court. It is a precedent that significantly expands and substantially infringes on the liberty and privacy of United States citizens. Plenary consideration of the matter by this Court is essential.

X.

CONCLUSION AND PRAYER

Petitioner prays that a writ of certiorari be issued to review the judgments of the Texas Court of Criminal Appeals dated October 17, 1984 and March 23, 1988, and that said judgments be reversed and the case remanded with instructions.

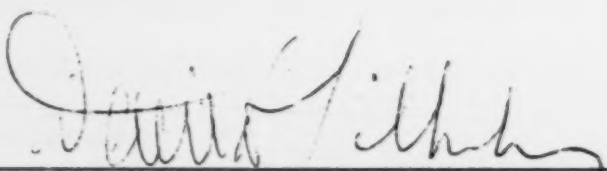
SAM P. BRADLEY - TN D.B. #8220
Counsel for Petitioner
100 North Main Bldg. #3002
Memphis, TN 38103
[901] 525-8271

DAVID D. SILBERBERG - TN D.B. #8350
Counsel of Record for Filing
A Member of the Bar of
The United States Supreme Court
100 North Main Bldg. #3002
Memphis, TN 38103
[901] 525-8271

XI.

CERTIFICATE OF SERVICE

I, the undersigned authority, hereby certify that on the _____ day of June, 1988 three (3) copies of Petitioner's Petition for Writ of Certiorari were mailed, first-class postage prepaid, to the Assistant District Attorney of Harris County, Texas, Timothy Taft, Esq., at 201 Fannin Street, Houston, Texas 77002, as well as the State Prosecuting Attorney, Robert Huttash, Esq., at P.O. Box 12405, Austin, Texas 75711. All parties required to be served have been served. I am a member of the Bar of this Court.



DAVID D. SILBERBERG - TN B.B. #8350
Counsel of Record for Filing
A Member of the Bar of
The United States Supreme Court
100 North Main Bldg. #3002

Lee Warren EISENHAUER, Appellant,

v.

The STATE of Texas, Appellee.

No. 01-82-0501-CR.

Court of Appeals of Texas,

Houston (1 Dist.)

Aug. 11, 1983.

OPINION

BASS, Justice.

This is an appeal from the offense of possession of cocaine, upon a plea of nolo contendere. In accordance with a plea bargain, the court assessed punishment of six years confinement, probated, and fined appellant $2,000. The court granted appellant permission to appeal the denial of his motion to suppress evidence.

The judgment is reversed and the cause is ordered dismissed.

At 1:00 p.m., on February 16, 1982, Officer Furstenfeld, a Houston police officer, received a phone call from an unknown informant concerning an individual named Lee Eisenhauer. The informant advised the officer that Eisenhauer would depart from Houston Intercontinental Airport at 1:30 p.m. en route to Miami. The informant further revealed that Eisenhauer would return from Miami the same day with cocaine in his possession.

The informant gave the officer a description of Eisenhauer. The description included the following details: Eisenhauer was a white male, approximately 22 years of age, 5'10" tall, weighing 160 pounds, with short, dark hair. He

would be wearing a beige tweed jacket, blue jeans, and white tennis shoes.

The officer went to the Continental ticket desk and ascertained that an individual named Lee Eisenhauer was booked on a 1:30 p.m. flight to Miami, and was booked to return on the same day from Miami at 8:03 p.m.

At 8:00 p.m. the officer observed appellant deplane and determined that he fit the description given by the informant. Officer Furstenfeld testified that appellant was carrying a piece of luggage and walked at a fast pace down the concourse, looking over his shoulder twice. Appellant took the escalator to the baggage area, bypassed the area, and approached the north exit. Officer Furstenfeld stated that none of these actions were unusual in an airport.

At this point Officers Burnias and Furstenfeld approached appellant, identified themselves as police officers, and asked if they could speak with him.

Fustenfeld asked appellant for his ticket and identification. Appellant complied with the request. Furstenfeld then advised appellant that he believed appellant to be in possession of cocaine. Appellant's hands began to shake, and he appeared nervous. His forehead broke out in perspiration and he began to stutter.

Furstenfeld requested permission to search appellant and his luggage. However, appellant did not respond. At this juncture, another officer, Officer Castillo, approached appellant and told him that they knew he had gone to Miami to buy cocaine and that they believed that appellant had cocaine in his bag or

on his person. Appellant stated, "What happens now?", whereupon Furstenfeld told him that he could consent to a search of his bag and person or require the officers to procure a warrant.

Another officer, Officer Gannon, joined the group at this time. Appellant was standing, backed into a phone cubicle, with four officers surrounding him.

Although appellant did not consent to a search, his luggage was then searched. No contraband was discovered. Officer Gannon then commented that the cocaine was probably in appellant's sock, and, at the same time, Furstenfeld asked appellant where the cocaine was located. Officer Castillo then told appellant to "give it up," in that he was "caught".

Appellant responded by taking off his jacket and handing it to Officer Burnias, saying only, "It's in the pocket". Two of the officers searched the pockets and a package wrapped in a napkin was discovered. Furstenfeld opened the napkin and observed a plastic bag filled with a white substance, which tested positive for cocaine.

Appellant at no time gave his permission for either a search of his luggage, his jacket, or the napkin-wrapped package. Although he was told that he could either consent to a search or require a search warrant, his luggage was immediately searched without consent. He handed over his jacket only after he had been told to "give it up", because he had been "caught".

[1] In his first ground of error, appellant contends that the trial court

erred in denying his motion to suppress evidence, because probable cause for his arrest was not established. He correctly points out that under current Texas law, where a warrantless arrest is based upon an informant's tip, the two-pronged Aguilar test must be met. 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). The Aguilar test requires a showing of (1) the circumstances underlying the informant's conclusions, i.e., the source of the informant's information; and (2) the reasons the officer deemed the individual credible and the information reliable.

Appellant asserts that the informant's tip in the case at bar was insufficient to establish probable cause for appellant's arrest, because no evidence was introduced establishing how the informant had obtained his information.

Moreover, the officer had not previously received information from the informant. Appellant urges that Officer Furstenfeld's mere assertion that his informant was reliable is an insufficient basis for establishing probable cause for arrest and cites Cole v. State, 484 S.W.2d 779 (Tex. Cr. App. 1972), as authority.

Appellant further points out that although the first prong of the Aguilar test, the "basis of the informant's knowledge" aspect, may be buttressed by the tip itself, the tip must describe the accused's criminal activity in sufficient detail to demonstrate that the information is based on personal knowledge. That is, the information must be more substantial than a casual rumor circulating in the underworld, and must not constitute merely an accusation pre-

dicated on an individual's general reputation. Appellant cites Spinelli v. U.S., 393 U.S. 410, 89 S.Ct. 584, 21 L. Ed.2d 637 (1969), as authority. He argues that the tip in the instant case is so vague, general, and lacking in detail as to constitute mere rumor, and asserts that it does not rise to the specificity required by Draper v. U.S., 358 U.S. 307, 79 S.Ct. 329, 3 L. Ed.2d 327 (1959).

Appellant's contention that the Aguilar test was not met is correct.

[2] However, contrary to appellant's assertion, the first prong of the Aguilar test was satisfied by the highly detailed nature of the informant's allegations. Every detail concerning appellant's physical description, attire, date and time of departure, destination, date and time of arrival, and name, was veri-

fied by the officers prior to interception. The only detail not verified prior to interception was possession of cocaine. Authority has held such evidence, when combined with evidence of the informant's reliability, to be sufficiently detailed. See, e.g., Hicks v. State, 545 S.W.2d 805 (Tex. Cr. App. 1977); Spinelli, supra; Draper, supra.

[3] Yet, regardless of whether the tip was sufficiently detailed to satisfy the first prong of the Aguilar test, the second prong was not met. No evidence was introduced establishing why the officer deemed the informant credible and the information reliable. To the contrary, the officer testified that he had never received any information from the informant previous to the phone conversation of February 16, 1982. He had no idea whether the informant had

accurate information when he acted upon it, and he testified that the informant himself had never seen the cocaine appellant was to obtain. According to the officer, all the informant knew was that "a person was supposed to go to Miami and obtain some cocaine". It is clear that the officer had no basis, such as past dealings with the informant, upon which to determine that the informant was credible and the information reliable. Nastu v. State, 589 S.W.2d 434 (Tex. Cr. App. 1979); Hicks, supra.

[4] It is clear from the evidence adduced at trial through the officer's testimony that appellant's detention was no mere "Terry stop and frisk." The search of appellant's baggage was not justified under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed.2d 889 (1968).

The officers entered into a full-blown search without probable cause. See, e.g., McVea v. State, 635 S.W.2d 429 (Tex. App.-San Antonio 1982, PDRR), and cases cited therein. Furthermore, after the search of his luggage failed to reveal any evidence of illegal activity, appellant was told that he had been "caught" and should "give it up." For all practical purposes, at this point he was under arrest. See Gonzales v. State, 581 S.W.2d 690 (Tex. Cr. App. 1979); Hardinge v. State, 500 S.W.2d 870 (Tex. Cr. App. 1973); Art. 15.22 Tex. Code Crim. Pro. Ann. (Vernon 1977). See, by contrast, Burkhalter v. State, 642 S.W.2d 231 (Tex. App.-Houston [14th Dist.] 1982).

[5] Probable cause was therefore not established, and the ensuing warrantless arrest was not lawful. See, by

contrast, Jones v. State, 640 S.W.2d 918 (Tex. Cr. App. 1982). Because the arrest was illegal, any evidence derived from the arrest would "absorb the taint" of that illegality, and would therefore properly be subject to suppression. Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L. Ed.2d 824 (1979).[1]

Appellant's first ground of error is sustained.

Appellant's second, third, and fourth grounds of error also address the illegality of the search. In view of the fact that the Aguilar test of proba-

---

1 In Illinois v. Gates, ___U.S.___, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), abolished the two-prong standard set forth in Aguilar v. Texas, 378 US 108, 84 S.Ct. 1509, 12 L.Ed. 723, but said, however, that the states could retain and follow the two-prong standard at its election. Texas, as yet, has not elected to abandon the two-prong standard.

ble cause was not met, these grounds need not be addressed.

[6,7] In his fifth ground of error, appellant contends that there was insufficient evidence to establish that appellant consented to the search for the package of cocaine seized. He correctly points out that consent to search is not to be lightly inferred, but must be free and voluntary in light of the totality of the circumstances. Green v. State, 594 S.W.2d 72 (Tex. Cr. App. 1980). Furthermore, consent is vitiated if granted only in submission to a claim of lawful authority. Id. Whether such consent is free and voluntary must be proven by clear and convincing evidence. It is a question of fact whether the accused gave positive and unequivocal consent. Kolb v. State, 532 S.W.2d 87 (Tex. Cr. App. 1976).

[8-11] Although the fact that the defendant was in custody at the time of his alleged consent did not necessarily prevent such consent from being characterized as free and voluntary, custody is a factor to be considered. Nastu, supra. Similarly, "coercive surroundings" is a factor to be considered in determining voluntariness of consent. Although it is unlikely that one coercive element will, standing alone, invalidate consent, where the question of consent is close, the presence of a single coercive element may "tip the scale." Furthermore, the threat by officers to obtain a search warrant, should consent be withheld, is also taken into consideration. See 2 LaFave, Search and Seizure §8.2(1)(2d. ed. 1979).

[12] In the instant case appellant was intercepted by four plainclothed officers. The officers told him that they knew he had gone to Miami to purchase cocaine and that they believed that he had it on his person or in his bag. Appellant was asked several times where the contraband was. Although the officers indicated that appellant could withhold consent and force them to get a search warrant, they immediately searched his bag without consent of any kind. The clear implication was that, contrary to the assertion that consent could be withheld, as a practicle matter, consent was immaterial. Furthermore, after completion of the unsuccessful search of the bag, the officers indicated that they intended to begin to search his person: they commented that the contraband was probably in appellant's sock.

At this point one officer told appellant to "give it up" because he had been "caught." Another officer continued to question appellant as to where the cocaine was. In fact the record reveals that the officer stated that he would not permit the appellant to leave the scene in the event that he would require the officers to secure a search warrant. It was only after the search of his bag without consent and the statement that appellant should "give it up," that appellant handed over his jacket and stated, "It's in the pocket."

[13] Appellant never gave a positive statement indicating consent to search; the most that can be argued is that consent was implied by his handing the jacket to the officers and indicating that "it" was in the pocket. However, it certainly appears from the

totality of the circumstances that appellant simply acquiesced to lawful authority. He was told to "give it up" and complied with the unequivocal demand. Although it is true that the question of voluntariness is a fact question, and the court, as trier of fact, was entitled to credit the testimony of the officers over that of appellant, McCallum v. State, 608 S.W.2d 222 (Tex. Cr. App. 1980), it is the officer's testimony itself which indicates that appellant's action in handing over the jacket was in response to a claim of lawful authority. From the record as a whole, the evidence was insufficient to support a finding that consent was voluntarily given. See Kolb, supra. See, by contrast, the sequence of events described in Myers v. State, 627 S.W.2d 527 (Tex. App.-Fort Worth 1982, PDRR).

Appellant's fifth ground of error is sustained.

[14] In his sixth ground of error appellant asserts that the trial court erred in failing to suppress the evidence, because appellant's consent to search was secured through the exploitation of his illegal arrest. We agree. As stated above, any purported "consent" was given in direct response to the officer's demand for the alleged contraband, under claim of lawful authority, and, hence, was acquired through exploitation of his illegal arrest. See reasoning in Green v. State, 615 S.W.2d 700 (Tex. Cr. App. 1980).

Appellant's sixth ground of error is sustained.

The judgment below is reversed and the cause is ordered dismissed.

Lee Warren EISENHAUER, Appellant,

v.

The STATE of Texas, Appellee.

No. 889-83.

Court of Criminal Appeals of Texas,

En Banc.

Oct. 17, 1984.

OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

ONION, Presiding Judge.

This appeal is from a conviction for possession of a controlled substance to-wit: cocaine. Following appellant's plea of nolo contendere before the court, punishment was assessed at six years' imprisonment, probated, and a fine of $2,000.00.

Prior to the bench trial, the appellant filed a pre-trial motion to

suppress evidence seized pursuant to his warrantless arrest and the search incident thereto. At a hearing on the motion to suppress, only one police officer testified and the motion was overruled. Thereafter appellant entered his nolo contendere plea and the evidence seized as a result of the search was utilized to support his plea and the judgment. See Article 1.15, V.A.C.C.P. After conviction, the appellant appealed only the denial of the pre-trial motion to suppress, which was permissible under Article 44.02, V.A.C.C.P.

On appeal the conviction was reversed by the Houston (1st) Court of Appeals. Eisenhauer v. State, 657 S.W.2d 184 (Tex. App.-Houston [1st]). That court found the trial court erred in overruling the motion to suppress in

that the warrantless arrest of appellant was based on an informer's tip which failed to meet the second prong of the test enunciated in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and explicated in Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

It is clear that the decision of the Court of Appeals was solely based on federal constitutional grounds.

We granted the State's petition for discretionary review to determine the correctness of that decision. The State urges that the Court of Appeals erred in not applying Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), which rejected the rigid two-prong test of Aguilar.

In his motion to suppress appellant urged:

"I

> "Defendant was arrested without a warrant and without probable cause in violation of the IV, V, and XIV Amendments to the Constitution of the United States and in violation of the laws and Constitution of the State of Texas.

"II

> "That the search of Defendant's person and luggage does not fall within any cogent exception to the Fourth Amendment."

After a hearing on said motion, appellant's counsel offered no authority to support his position that no probable cause had been shown except a reference to "Draper-Aguilar-Spinelli situations." The motion to suppress was overruled.

In his first ground of error on appeal, appellant contended:

> "The trial court erred in failing to suppress the evidence for the reason that appellant's (sic) arrest was without probable cause."

Among the authorities urged were

Aguilar, Spinelli, Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959), Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), and Shimel v. State, 640 S.W.2d 666 (Tex. App.-Houston [14th] 1982), applying Draper.

In grounds of error two, three and four appellant expressly contended the search was in violation of state law. In grounds of error five and six he contended there was sufficident evidence to show he consented to the search, and if he did consent, such consent to search was secured through the exploitation of his illegal arrest.

The Court of Appeals sustained appellant's first ground of error on federal constitutional grounds finding no probable cause for the warrantless arrest and that any evidence derived

from the arrest should have been suppressed citing Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). The Court of Appeals also sustained the fifth and sixth grounds of error regarding consent. As to appellant's contentions regarding state statutes and law, the Court wrote:

> "Appellant's second, third, and fourth grounds of error also address the illegality of the search. In view of the fact that the Aguilar test of probable cause was not met, these grounds need not be addressed."

The State in its petition for discretionary review urged that the "panel opinion of the First Court of Appeals erred in its failure to aply Illinois v. Gates...to this case."[1]

Thus the only question before us for review is whether the Court of Appeals properly applied federal constitutional law in finding that there was

no probable cause for the warrantless arrest and that the trial court erred in overruling the motion to suppress evidence.

Initially we look to the facts developed at the suppression hearing.

Houston Police Officer D.D. Furstenfeld of the Narcotics Division was assigned to the Houston Intercontinental Airport on February 16, 1982. About 1 p.m. he received a telephone call at his office in Terminal A. He revealed the call was from "a reliable informant, confidential" who gave him information concerning an individual named Lee Eisenhauer. Furstenfeld was told Eisenhauer would depart from the airport at 1:30 p.m. en route to Miami, Florida, and would return to Houston on the same day with cocaine in his possession.

The informant gave the following description of Eisenhauer: white male, approximately 22 years of age, 5'10" tall, weighing 160 pounds, with short, dark hair. He told Furstenfeld that Eisenhauer would be wearing a beige tweed jacket, blue jeans, and white tennis shoes.

Officer Furstenfeld went to Terminal C and observed the plane for Miami leaving the gate. He went to the Continental Airlines ticket desk and ascertained that a Lee Eisenhauer was on the 1:30 flight to Miami, and was booked on a return flight the same day which would arrive in Houston at 8 p.m.

At 8:03 p.m. Furstenfeld saw an individual fitting the description given by the informant, deplane. He testified that while the individual was dressed as described, etc., he still did not know

the individual's name. The individual looked around the gate lobby, appearing somewhat nervous. The individual was carrying a piece of carry-on luggage. He walked at a fast pace down the concourse, looking over his shoulder twice. He took the escalator to the baggage area, bypassed that area, and approached the north exit.

At this point Furstenfeld and his partner, Officer Burnias, approached the individual, identified themselves as police officers, and asked if they could talk to him. The individual agreed. He moved toward a small phone booth or cubicle and put his bag down. The officers asked if he had just returned from Miami. He stated he had.

When asked for his ticket and other identification, the individual complied.

The airline ticket and other identification bore the name Lee Eisenhauer.

When appellant inquired "What's this all about?" Furstenfeld advised Eisenhauer, identified as the appellant, that he believed him to be in possession of cocaine brought in from Miami. Appellant, according to the officer, became nervous, his hands began to shake, perspiration broke out on his forehead and he began to stutter.

At this juncture, another police officer,[2] Castillo, standing nearby, approached the appellant and told him that they "were onto his game" and knew he had gone to Miami to "score cocaine" and asked if he had it with him. Appellant looked at the officers and stuttered, "What happens now?" Furstenfeld advised they would like for him to consent to a search of his person and

bag, that he did not have to consent, that he had a right to require a search warrant before any search was made.

What happened thereafter varies somewhat from the direct to the cross-examination of the officer.

On direct examination by the State Furstenfeld related appellant responded to his advice about consent by taking off his jacket, handing it to Officer Burnias and stating, "It's in the pocket." Burnias looked in one pocket and Furstenfeld looked in the other pocket, and he (Furstenfeld) recovered a small ziploc baggie wrapped in a napkin, containing approximately 28 grams of white powder. Furstenfeld field-tested it and it reacted positive for cocaine.

On cross-examination Furstenfeld stated that after his statement regarding consent that appellant stuttered but

did not say anything. It appears that the appellant's bag was then searched which did not reveal any contraband. At this point Officer Gannon, standing nearby, suggested the cocaine might be in appellant's sock. Officer Castillo then said to appellant, "Give it up, you are caught" or something "like that." It was then that appellant handed his coat to the officers who found the cocaine.

In Aguilar, the Supreme Court wrote:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be dis-

> closed, see Rugendorf v. United States, 376 U.S. 528, 84 S.Ct. 825 [11 L.Ed.2d 887] was 'credible' or his information 'reliable'." 378 U.S. at 114-115, 84 S.Ct. at 1514.

The holding in Spinelli was, inter alia, that corroborating facts from police observations which are stated in the search warrant can be taken into account to determine whether the affidavit as a whole meets the requirements of Aguilar.

The Court of Appeals in this warrantless arrest case found the first prong of Aguilar was "satisfied by the highly detailed nature of the informant's allegations," citing Spinelli, but found the second prong was not met since it was not shown why the officer deemed the informant credible and the information reliable.

In Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (June 8,

1983), the Supreme Court held that the rigid "two-prong test" under Aguilar and Spinelli for determining whether an informant's tip establishes probable cause for issuance of a warrant would be abandoned and a "totality of the circumstances" approach that traditionally has informed probable cause determinations would be substituted in its place, and that probable cause for the search warrant authorizing search of the Gates' home and automobile was established by anonymous letter indicating that the defendants were involved in activities in violation of State drug laws and predicting future criminal activities where major portions of the letter's predictions were corroborated by information provided to affiant by federal agents.

In Gates the Court wrote:

"We agree with the Illinois Supreme Court that an informant's 'veracity', 'reliability' and 'basis of knowledge' are all highly relevant in determining the value of his report. We do not agree, however, that these elements are entirely separate and independent requirements to be rigidly exacted in every case which the opinion of the Supreme Court of Illinois would imply. Rather, as detailed below, they should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place.

"This totality of the circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip.
" * * *

"As these comments illustrate, probable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules.
" * * *

"Unlike a totality of circumstances analysis, which permits a balanced assessment of the relative weight of all the various indicia of reliability (and unreliability) attending an informant's tip, the 'two-pronged test' has encouraged an excessively technical dissection of informant's tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate.
" * * *

"Fcr all these reasons, we conclude that it is wiser to abandon the 'two-pronged test' established by our decisions in Aguilar and Spinelli. In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations. See Jones v. United States, supra; United States v. Ventresca, supra; Brinegar v. United States, supra. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying heresay information, there is a fair probability that contraband or evidence of a crime will be

> found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for...conclud[ing]" that probable cause existed, Jones v. United States, supra, 362 U.S., at 271, 80 S.Ct., at 736. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from Aguilar and Spinelli."

The Court in Gates emphasized that the task of a reviewing court is not to conduct a de novo determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant.

To emphasize what it intended in Gates, the Supreme Court recently reversed the Supreme Judicial Court of Massachusetts in Massachusetts v. Upton, - U.S. -, 104 S.Ct. 2085, 80 L.Ed.2d

721, 35 Cr.L. 4044 (May 14, 1984). In Upton the Massachusetts court apparently viewed Gates as merely adding a new wrinkle to the two-pronged test of Aguilar and Spinelli: where an informant's veracity and basis of knowledge are not sufficient, substantial corroboration of the tip may save an otherwise invalid warrant. The Supreme Court, however, called attention to its explicit language in Gates that it was abandoning the Aguilar-Spinelli approach, and faulted the Massachusetts court for conducting a de novo probable cause determination instead of merely deciding whether the evidence viewed as a whole provided a "substantial basis" for the magistrate's finding of probable cause.

[1,2] We here observe that Aguilar and Spinelli and Gates all concerned

search warrants, but it is well established that the standard for determining the sufficiency of the informant's tip is the same for either search warrants or arrest warrants. Whitely v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971); Cole v. State, 484 S.W.2d 779 (Tex. Cr. App. 1972) (footnote 2). And the standards applicable to determining whether the facts of a case support an officer's probable cause assessment at the time of the challenged warrantless arrest and search are at least as stringent as the standards applied when reviewing the decision of a magistrate. Whiteley v. Warden, Wyoming State Penitentiary, supra; Ochs v. State, 543 S.W.2d 355 (Tex. Cr. App. 1976), cert. den. 429 U.S. 1062, 97 S.Ct. 786, 50 L.Ed.2d 778

(1977); Truitt v. State, 505 S.W.2d 594, 596 (Tex. Cr. App. 1974); Cole v. State, supra; Brown v. State, 481 S.W.2d 106 (Tex. Cr. App. 1972).

In United States v. Mendoza, et al, 722 F.2d 96 (5th Cir. 1983), the court in footnote #5 stated:

> "We recognize that Gates dealt with probable cause for the issuance of a warrant for the search of a vehicle and a house. This determination of probable cause, however, is applicable to both warrant and warrantless searches. Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959)..."

[3] It is clear that the "totality of the circumstances" standard of Gates is applicable to warrantless arrests and searches.

In Bellah v. State, 653 S.W.2d 795 (Tex. Cr. App. 1983), this court held that Gates applied instead of Aguilar in

a case involving an affidavit for an arrest warrant.

Without reaching an application of Gates, the State argues in its brief that the warrantless arrest and seach incident thereto in the instant case could be upheld under the Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959)-Almendarez v. State, 460 S.W.2d 921 (Tex. Cr. App. 1970), line of cases. See Rangel v. State, 444 S.W.2d 924 (Tex. Cr. App. 1969); Fry v. State, 493 S.W.2d 758 (Tex. Cr. App. 1972); Rivas v. State, 506 S.W.2d 233 (Tex. Cr. App. 1974); Buitron v. State, 519 S.W.2d 467 (Tex. Cr. App. 1975); Ochs v. State, 543 S.W.2d 355 (Tex. Cr. App. 1976) cert. den. 429 U.S. 1062, 97 S.Ct. 786, 50 L.Ed.2d 778 (1977); Roberts v. State, 545 S.W.2d 157 (Tex. Cr. App. 1977);

Hicks v. State, 545 S.W.2d 805, 858 (Tex. Cr. App. 1977). See also United States v. Acosta, 411 F.2d 627 (5th Cir. 1969); Fry v. Estelle, 527 F.2d 420 (5th Cir. 1976).

Almendarez involved a warrantless arrest and a search incident thereto. There a police officer received information from a previously reliable informer. The information given included detailed description of automobiles of defendant and his companion, including license numbers, and marihuana could be found in the vehicle which would be located at a certain location. The officer was not told the informer had seen marihuana or how he had come by his information. The officer went to the location and found the automobiles as described. There this court wrote: "There would appear to be some indication that the informer

spoke with personal knowledge or had gained his information in a reliable way. At the point of interception every fact except the presence of marihuana was verified." The arrest and the search that followed was upheld. See also Fry v. Estelle, supra.

In Buitron, supra, it was held on the basis of the independent observations of the officers coupled with the information from the reliable informer, there was probable cause to search the red and white pickup and the defendant. See also Kwant v. State, 472 S.W.2d 781 (Tex. Cr. App. 1971); Hicks v. State, supra.

This line of cases, as in Draper,[3] nearly always includes a tried and true informer which satisfies the second prong of Aguilar, and situations where the details given by the informer and

corroboration of the details by the officers satisfies the first prong of Aguilar. See Jones v. State, 640 S.W.2d 918 (Tex. Cr. App. 1982). While this line of cases is instructive, the informer in the instant case was not shown to be a previously reliable informer, or one which had a proven track record.

[4] We now look at the "totality of the circumstances" approach. Officer Furstenfeld testified he received his information from "a reliable informant, confidential." He did not testify nor was he asked whether the informer had given him previously reliable information, etc.[4] A mere assertion or conclusion that an informer is credible, without more, is insufficient to establish credibility. Aguilar, supra; Cole v. State, 484 S.W.2d 779, 782 (Tex.

Cr. App. 1972). This much of Aguilar is still retained by Gates. 462 U.S. at __ 03 S.Ct. at p. 2332. Moving on, we observe that once Officer Furstenfeld received the informer's tip, he went immediately to Termincal C of the airport and found the plane to Miami at 1:30 p.m. was leaving. At the Continental Airlines ticket counter he found a Lee Eisenhauer was on the departed flight and booked to return to Houston that night, just as the informer had reported. At this point he was unable to verify the physical descriptions given, etc., by the informer. As Furstenfeld related, he would not have at the time been able to present probable cause to a magistrate. He met the incoming flight from Miami. At 8:03 p.m. he observed an individual wearing the clothes described by the

informer and meeting the physical description. The individual, carrying a bag, looked around the gate lobby appearing nervous. Then he walked at a fast pace down the concourse looking over his shoulder twice. He bypassed the baggage area and headed for the north exit. Officer Furstenfeld admitted that most of these actions were common in airports and were innocent in themselves.

In Gates, 462 U.S. at __, 103 S.Ct. at p. 2335, n. 13, the Court observed that seemingly innocent activity may become suspicious in the light of the initial tip. The Court wrote:

> "...As discussed previously, probable cause requires only a probability or substantial chance of criminal activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to sub silentio impose a drastical-

> ly more rigorous definition of probable cause than the security of our citizens demands... In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty', but the degree of suspicion that attaches to particular types of non-criminal acts." See also United States v. Mendoza, et al., 722 F.2d 96 (5th Cir. 1983).

As Furstenfeld saw the individual head for the north exit, he and his partner approached him and identified themselves as police officers. They asked if they could talk to him. The individual agreed and affirmatively answered the question of whether he had been to Miami. He complied with the request for his airline ticket and other identification. The ticket and other identification bore the name Lee Eisenhauer as given by the informer.

In Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d (1983), the Court wrote:

> "Second, law enforement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. See Dunaway v. New York, 442 U.S. 200, 120, n. 12, 99 S.Ct. 2248, 2255, n. 12, 60 L.Ed.2d 824 (1979); Terry v. Ohio, 392 U.S. 1, 31, 32-33, 88 S.Ct. 1868, 1885-1886, 20 L.Ed.2d 889 (1968) (Harlan, J., concurring); ed. at 34, 88 S.Ct. at 1886 (White, J., concurring). Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. United States v. Mendenhall, 446 U.S. 544, 555, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980) (Opinion of Stewart, J.). The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all

and may go on his way. Terry v. Ohio, supra, 392 U.S. at 32-33, 88 S.Ct. at 1885-1886 (Harlan, J., concurring) id, at 34, 88 S.Ct. at 1886 (White, J., concurring).

"Asking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves..." Royer 460 U.S. at 497, 103 S.Ct. at p. 1326.

[5] The request in the instant case for and examination of Eisenhauer's airline ticket and other identification was likewise permisible in and of themselves.

At this juncture Eisenhauer, who was identified as the appellant, asked "What's this all about?" Furstenfeld advised him that it was believed that he was in possession of cocaine brought from Miami. Eisenhauer then became nervous, his hands began to shake, perspiration appeared on his forehead, and he began to stutter. Officer Castillo

approached from his observation post, told appellant they were "onto his game" and asked if he had the cocaine he brought from Miami. Furstenfeld asked appellant to consent to a search, that he did not have to consent, that he could require a search warrant. The exact sequence of events thereafter is not clear. Appellant either immediately handed his coat to the officers after the warnings concerning consent, or when he said nothing after the consent admonishment, there was a fruitless search of his bag, a suggestion that "it" was in his sock and at that time the appellant relinquished his coat.

[6] Regardless, it appears that when Castillo approached appellant was in a phone cubicle surrounded by four plain-clothes officers, accusing him of transporting narcotics and requesting

consent to search, or stating a search warrant would be obtained, and without indicating in any way that he was free to depart.[5] "These circumstances surely amount to a show of official authority such that 'a reasonable person would have believed he was not free to leave.' United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (Opinion of Stewart, J.)." Florida v. Royer, 460 U.S. at 497, 103 S.Ct. at p. 1326. Thus appellant was effectively seized for the purposes of the Fourth Amendment.

[7,8] Even if the informer was anonymous, he gave the officer a fair detailed physical description of the appellant and his clothing, giving appellant's name, and predicting his future actions that day and the purpose of appellant's trip. Then the corrobor-

ative efforts of the police began. At the time of the interception, the arresting officer had personally verified every facet of the information given him by the informer except whether appellant had accomplished his mission and the cocaine was on his person or in his bag.[6] These circumstances, along with appellant's actions in the airport after arrival, albeit mostly innocent, together with his reactions when he learned the officers believed he possessed cocaine brought from Miami, furnished a substantial basis for Officer Furstenfeld to conclude there was probable cause to arrest the appellant, particularly when the "totality of circumstances" test is applied. The arrest was valid, and fruits of the search incident thereto were admissible in evidence as a matter

of federal constitutional law. The trial court did not err in overruling the motion to suppress on this basis. Illinois v. Gates, supra.[7]; United States v. Peyko, 717 F.2d 741 (2nd Cir. 1983).

The judgment of the Court of Appeals is reversed and the cause is remanded to that court for action not inconsistent with this opinion, and to answer the grounds of error with regard to Texas law left unanswered because of the reversal of the conviction.

CLINTON, Judge, dissenting.

The opinion of the Court does not make "clear" to me that "the 'totality of the circumstances' standard of Gates is applicable to warrantless arrests and searches," (P. 952), and neither does

the excerpt from a footnote in an opinion by the United States Court of Appeals for the Fifth Circuit. Indeed, so long as Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959) is extant, for the very reasons given by the Court (P. 953) the informant in the instant case will not pass muster under Draper. Thus, what the Court really finds is that the measure of probable cause under Draper has been replaced by the "totality" test of Gates. With deference, such a momentous decision as that should first be made by the Supreme Court of the United States. It is on that point that I respectfully dissent.[8]

That done, given the views so vigorously expressed in the dissenting opinion, it is important to understand

just what is, as well as what is not, before this Court for review.

In its petition for discretionary review the State presents but one ground for review, viz:

> "The panel opinion of the First Court of Appeals erred in its failure to apply Illinois v. Gates...to this case on the basis that Texas has not yet elected to abandon the two-prong standard set forth in Aguilar v. Texas..."

Our grant of review was no broader than the ground presented, and the opinion of the Court must be read with that understanding. That is to say, all that this Court is deciding is "a matter of federal constitutional law." (P.955). Whether the arrest and search of appellant were authorized by state law remains to be determined by the Court of Appeals on remand.

Similarly, we have no occasion today to retain or abandon the two-prong

standard of Aguilar as a matter of state law. Though the majority opinion comments on that matter, the Court does not foreclose the Court of Appeals from considering it as well on remand.

TEAGUE, Judge, dissenting.

It appears to me that sometimes some members of this Court respond to recent decisions of the Supreme Court of the United States much like the German boatsmen of old did when they heard Lorelei, the siren of German legend. And, Cappy, we all know what happened to the boatsmen, don't we?

After carefully reading the majority opinion, it is apparent to me that Presiding Judge Onion, its author, and those members of this Court who join in the opinion, have ignored what the

Legislature of this State enacted after Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), was decided by the Supreme Court of the United States. See Chapter 18, V.A.C.C.P., which was enacted by the Legislature after Aguilar v. Texas, supra, was decided.

I find that the Supreme Court decision of Aguilar v. Texas, supra, was conceived by this Court's decision of Nick Alfred Aguilar v. State, 172 Tex. Cr. R. 629, 362 S.W.2d 111 (1962).

In Nick Alfred Aguilar v. State, supra, the defendant, Nick Alfred Aguilar, hereinafter referred to as Nick, challenged on the appeal the sufficiency of an affidavit for a search warrant that had been issued by a justice of the peace of Harris County to search his residence for narcotics. The

opinion on original submission by Judge Morrison reflects that incident to the search that was thereafter conducted, the police found narcotics inside of Nick's residence, for which Nick was subsequently prosecuted and convicted. Nick appealed his conviction to this Court, but this Court affirmed his conviction. See Aguilar v. State, supra.

On original submission, this Court, in an opinion by Judge Morrison, upheld the affidavit for the search warrant that had issued, even though it only stated the following: "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions

of the law." Nevertheless, this Court concluded: "[An] [e]xamination of the affidavit shows that it recites sufficient facts and information to constitute probable cause for the issuance of the warrant."

Nick filed a motion for rehearing, in which he appears to have forcefully asserted that the affidavit for the search warrant was insufficient, "under the Federal Constitution." He relied upon Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), as authority for his contention.

On rehearing, this Court rejected Nick's assertion, reaching a two-fold conclusion, namely, "[w]e are unable to bring ourselves to the conclusion that our exclusionary statute, (Art. 727a, V.A.C.C.P., now Art. 38.23, V.A.C.C.P.), and the affidavit before us here deprive

an accused of due process under the Federal Constitution." (114).

The opinion on rehearing reflects that before Judge Morrison, its author, reached the above conclusions, he had made a passing reference to the Texas Constitution, without citing or discussing any provision thereof. He also stated the following: "Our statute (Article 4, V.A.C.C.P., now Art. 1.06, V.A.C.C.P.), makes no such specific requirement, (that in addition to the grounds for probable cause for its issuance, the names of the persons whose affidavits had been taken in support thereof must be stated in the affidavit), but does provide that no warrant shall issue without probable cause supported by oath or affirmation." No reference was made in the opinion to the provisions of Articles 304, 311, and 312

(1925 Code of Criminal Procedure, now Articles 18.01, 18.08, and 18.09, V.A.C.C.P.), which then controlled the issuance of a search warrant in this State.

I pause to point out that a State, through its Legislature or its judiciary, is free, as a matter of its own law, to impose greater restrictions upon police activity than those the Supreme Court of the Unites States holds to be necessary upon federal constitutional standards. See Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975). Obviously, now as then, see the majority opinion and Aguilar v. State, supra, this Court has seen fit to limit the rights of the citizens of this State.

After this Court affirmed Nick's conviction, and overruled his motion for

rehearing, Nick went on to Washington, D.C., where, when it came to what requirements must first be satisfied before a search warrant could issue in this State, history was about to be made. At that time, contrary to now, the Supreme Court was very concerned about the rights of citizens of these United States.

In Aguilar v. Texas, supra, the Supreme Court of the United States implicitly nullified virtually all of what this Court had stated in Aguilar v. State, supra. The Supreme Court held that, as a matter of Federal Constitutional law, if an affidavit for a search warrant was based upon hearsay, it must satisfy a two-prong test, namely, "The magistrate must (1) be informed of the underlying circumstances from which it can be determined that the affiant

received his information in a 'reliable' way, and the magistrate must also (2) be informed of specific factual allegations from which the affiant concluded that the source was 'credible' or his information 'reliable.' Absent such factual allegations, there is not a sufficient basis for a neutral magistrate to make an impartial determination that probable cause exists." Winkles v. State, 634 S.W.2d 289, 291 (Tex. Cr. App. 1982) (On Original Submission). This came to be known as the "Aguilar two-prong test."

After the Supreme Court of the United States decided Aguilar v. Texas, supra, the 59th Legislature of this State, in 1964, enacted a new code of criminal procedure for this State. Judge Fred Erisman, who was then one of the leading legal scholars of this State, but who is now deceased, in his

"Introduction to the 1965 Revision Texas Code of Criminal Procedure," and under the statement, "Consideration of recent decisions of the Supreme Court of the United States which have adversely affected the long accepted practices in our Texas Courts," pointed out the following: "The filing of sufficient facts to satisfy the Magistrate that probable cause does in fact exist for the issuance of a search warrant, is a requirement of Articles 18.01, 18.08, and 18.09, supplementing CCP 304, 311 312."

Presiding Judge Onion, the author of the majority opinion in this cause, wrote a "Special Commentary" to the change in the law. After interpreting the provisions of Art. 18.01, supra, he had this to say in his special commentary about the new statutory provisions:

"Therefore the affiant... on affidavit for search warrant can no longer merely state he has received reliable information from a credible person... that an offense has been committed, etc. The affidavit must show the magistrate... additional facts to form a sufficient basis in fact for a determination by the magistrate that probable cause exists for the issuance of a search warrant."

Thus, it should be obvious to anyone that when the Legislature of this State enacted Chapter 18, supra, and, in particular, Art. 18.01(b), V.A.C.C.P., which it subsequently amended so that it now reads, "No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance," and "A

sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested," the Legislature of this State intended and meant for the two-prong test announced in Aguilar v. Texas, supra, to become the law of this State. "The new code has been reworded to meet the requirements of Aguilar v. Texas, supra." Special commentary by Presiding Judge Onion.

The fact that in this instance the arrest and search were made without warrant is insignificant because it is now axiomatic that the standards applicable to the factual basis supporting probable cause for a warrantless arrest and search are at least as stringent as those applied to obtaining a search warrant, Whitely v. Warden of Wyoming

Penitentiary, 401 U.S. 560, 566, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971), and may even be more stringent, see United States v. Squella-Avendano, 447 F.2d 575, 579 (5th Cir. 1971). Also see United States v. Anderson, 500 F.2d 1311, rehearing denied, 504 F.2d 760 (5th Cir. 1974), and Colston v. State, 511 S.W.2d 10 (Tex. Cr. App. 1974).

Unfortunately, the rights of the citizens of these United States, when it came to searches and seizures, were set back on June 18, 1983, when the Supreme Court of the United States held in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), that, for Fourth Amendment purposes, the two-prong test of Aguilar v. Texas, supra, was no longer acceptable. It adopted, in the place of the "Aguilar two-prong

test," see supra, a "totality of the circumstances" test.

Notwithstanding the action of the Supreme Court, but because of the adoption of Chapter 18, supra, the Legislature of this State has seen fit, as a matter of Texas law, to impose a greater burden upon the police before they might obtain a search warrant from a magistrate or to arrest and search a person without a warrant; thus, Illinois v. Gates, supra, should have no effect upon Texas law.

Because the Legislature of this State has spoken, and though given the opportunity since Illinois v. Gates, supra, was decided to adopt the "totality of the circumstances" test announced by the Supreme Court in Illinois v. Gates, supra, it has not chosen to do so, this Court should

continue to apply the holding of Aguilar v. Texas, supra, which has been incorporated into Chapter 18, supra, in making the determination whether an affidavit for a search warrant is valid or in making the determination whether there is probable cause to make a warrantless arrest and search.

I pause to ask: Have the members of this Court who join in the majority opinion forgotten so soon what a plurality of this Court stated in Brown v. State, 657 S.W.2d 797, 799, (Tex. Cr. App. 1983), as to this Court adhering to what our Legislature has enacted into law?

The Legislature has mandated by statute, see Chapter 18, supra, a different State law test from the federal law test the Supreme Court announced in Illinois v. Gates, supra.

We should apply what the Legislature of this State has enacted and not head for the reefs.

The law in Texas is quite simple: Before an affidavit for a search warrant should issue, or before a warrantless arrest and search should take place, the two-prong test of Aguilar v. Texas, supra, must first be satisfied. Tolentino v. State, 638 S.W.2d 499, 501 (Tex. Cr. App. 1982).

I find that Justice Bass, the author of the opinion for the Court of Appeals, which is before this Court for review purposes, has sufficiently stated all that is necessary to be stated why the warrantless arrest and search that occurred in this cause are insufficient under Texas law, and why such were invalid under the "Aguilar two-prong test." Therefore, Justice Bass' opinion

should be adopted as this Court's opinion.

For reasons stated by Justice Bass, in the opinion he authored, the warrantless arrest and search that occurred in this cause were invalid under the two-prong test of Aguilar v. Texas, supra, which has been implicitly, by judicial edict, made a part of Art. 1, Section 9, of the Texas Constitution, and has been expressly, by legislative edict, incorporated into the provisions of Chapter 18, supra. Also see Tolentino v. State, supra, at 501; Wilson v. State, 621 S.W.2d 799, 803 (Tex. Cr. App. 1981); Green v. State, 615 S.W.2d 700, 706-707 (Tex. Cr. App. 1981); Kleasen v. State, 560 S.W.2d 938, 942-944 (Tex. Cr. App. 1978); Knox v. State, 586 S.W.2d 504 (Tex. Cr. App. 1979); Doescher v. State, 578 S.W.2d 385 (Tex. Cr. APp. 1979);

Smith v. State, 496 S.W.2d 90 (Tex. Cr. App. 1973); Gatson v. State, 440 S.W.2d 297 (Tex. Cr. App. 1969).

In all due respect to the majority of the members of this Court who join in the opinion authored by Presiding Judge Onion, as well as Presiding Judge Onion, Aguilar v. Texas, supra, was, before today, alive, well and breathing in this great State of Texas.

I respectfully dissent to the majority's failure to adhere to the law as enacted by the Legislature of this State. By its decision, the Court today acts legislatively, not judicially. This it should not do because it poaches upon territory that is constitutionally reserved to another body of our government-the Legislature of this State.

---

1 After sustaining the first ground of error on federal constitutional grounds, the court added footnote #1:

> "In Gate v. Illinois (sic), no. 81-430, U.S. Supreme Court, decided June 8, 1983 [462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527], abolished two-prong standard set forth in Aguilar v. Texas, 378 U.S. 108 [84 S.Ct. 1509, 12 L.Ed.2d 723], but said, however, that the states could retain and follow the two-prong standard at its election. Texas, as yet, has not elected to abandon the two-prong standard."

The court did not base its decision on ground of error #1 on any discussion that independent of federal constitutional law Texas had in fact adopted the Aguilar test, as part of the state law, or that having adopted the same had not elected to abandon the same. All we have is the assertion in the footnote. Since the Court of Appeals did not reach the grounds of error relating to Texas law, it is not clear why the footnote was added. In view of our disposition of this cause we make no comment on the soundness of the statement made in the footnote.

2 All officers involved were dressed in mufti.

3 See and cf. footnote 12 of Gates relating to Draper.

4 The Court of Appeals was in error in stating that Furstenfeld had never received any information from the informer prior to the telephone call on February 16, 1982. The record on cross-examination reflects:

> "Q When did you receive your information from the informant?
> "A At approximately 1:00 o'clock p.m.
> "Q Had he given you any information before 1:00 o'clock with respect to Mr. Eisenhauer?
> "A After I spoke to him on the phone one is all I talked to him, no, sir." (Emphasis supplied.)

This does not translate into the conclusion reached by the Court of Appeals, and we find no other record evidence relating to the matter.

5 It is not clear whether appellant's airline ticket and other identification had been returned to him.

---

6 There would certainly appear to be some indication that the informer spoke with personal knowledge or had gained his information in a reliable way.

---

7 There is a constitutional preference for a warrant issued by a magistrate. Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948). We, however, observe what this court said in Buitron v. State, 519 S.W.2d 467 (Tex. Cr. App. 1975), is here controlling:

> "It would have been a greater intrusion, and unnecessary, to hold the occupants until either of the two magistrates in the county could be found. There was no error in the search conducted. Chambers v. Maroney, supra; Harris v. State, 486 S.W.2d 88 (Tex. Cr. App. 1972); Coyne v. State, supra [485 S.W.2d 917 (Tex. Cr. App. 1972)]." See also Scott v. State, 531 S.W.2d 825 (Tex. Cr. App. 1976); Craddock v. State, 553 S.W.2d 765 (Tex. Cr. App. 1977).

8 Also I do not agree with observations in note 7, for the case quoted involved occupants of a pickup truck and perforce the search was permissible under the "automobile exception" to the requirement of a warrant under the Fourth Amendment.

Lee EISENHAUER, Appellant,

v.

The STATE of Texas, Appellee.

No. 01-82-0501-CR.

Court of Appeals of Texas,

Houston (1st Dist.).

Dec. 31, 1984.

ON REMAND

BASS, Justice.

This is an appeal from a conviction for the offense of possession of cocaine upon a plea of nolo contendere. In accordance with a plea bargain, the court assessed punishment at six years confinement, probated, and fined appellant $2,000. The court granted appellant permission to appeal the denial of his motion to suppress evidence. On appeal,

this court reversed and ordered the cause dismissed. 657 S.W.2d 184. The state filed a petition for discretionary review which was granted and the judgment of this court was reversed and remanded to this court for consideration of additional issues. Eisenhauer v. State, 678 S.W.2d 947 (Tex.Crim.App., 1984).

The Court of Criminal Appeals considered only the question of was whether this court properly applied federal constitutional law in finding a lack of probable cause for the warrantless arrest. The Court of Criminal Appeals determined that our decision was based solely on federal constitutional grounds and did not reach a consideration of state law. Thus, that court reversed our judgment and remanded the cause to

this court to consider the grounds of error with regard to Texas law.

At one o'clock p.m., on February 16, 1982, Officer Furstenfeld, a Houston police officer, received a phone call from an unknown informant concerning an individual named Lee Eisenhauer. The informant advised the officer that Eisenhauer would depart from Houston Intercontinental Airport at 1:30 p.m. en route to Miami. The informant further revealed that Eisenhauer would return from Miami the same day with cocaine in his possession.

The informant gave the officer a description of Eisenhauer. The description included the following details:

Eisenhauer was a white male, approximately 22 years of age, 5'10" tall weighing 160 pounds, with short,

dark hair. He would be wearing a beige tweed jacket, blue jeans, and white tennis shoes.

The officer went to the Continental ticket desk and ascertained that an individual named Lee Eisenhauer was booked on a 1:30 p.m. flight to Miami, and was booked to return the same day from Miami at 8:03 p.m. At 8:00 p.m. the officer observed appellant deplane and determined he fit the description given by the informant. Officer Furstenfeld testified that appellant was carrying a piece of luggage and walked at a fast pace down the concourse, looking over his shoulder twice. Appellant took the escalator to the baggage area, bypassed the area, and approached the north exit. Officer Furstenfeld stated that none of these actions were unusual in the air-

port. At this point Officer Burnias and Furstenfeld approached the appellant, identified themselves as police officers, and asked if they could speak with him. Furstenfeld asked appellant for his ticket and identification. Appellant complied with the request. Furstenfeld then advised appellant that he believed him to be in possession of cocaine. Appellant's hands began to shake and he appeared nervous. His forehead broke out in perspiration and he began to stutter.

Furstenfeld requested permission to search appellant and his luggage. However, appellant did not respond. Officer Castiglo then approached appellant and told him that they knew he had gone to Miami to buy cocaine and that they believed him to have cocaine

in his bag or on his person. Appellant then stated "What happens now," whereupon Furstenfeld told him that he could consent to a search of his bag and person or require the officers to procure a warrant. Another officer, Officer Gannon, joined the group at this time. Appellant was standing backed into a phone cubicle with four officers surrounding him. Appellant's luggage was then searched but no contraband was discovered. Officer Gannon then commented that the cocaine was probably in appellant's sock, and at that time Furstenfeld asked appellant where the cocaine was located. Officer Castiglo then told appellant to "give it up", that he was "caught".

Appellant responded by taking off his jacket and handing it to Officer

Burnias saying only "It's in the pocket". Two of the officers searched the pockets and a package wrapped in a napkin was discovered. Furstenfeld opened the napkin and observed a plastic bag full of a white substance, which tested positive for cocaine.

Appellant at no time gave permission for the search of his luggage, jacket, or the napkin-wrapped package. Although he was told that he could either consent to a search or require a search warrant, his luggage was immediately searched without consent. Officer Furstenfeld admitted, on cross-examination, that appellant handed over his jacket only after he had been told to "give it up" because he had been "caught."

In his first ground of error, appellant contends that "The trial court erred in failing to suppress the evidence, for the reason that appellant's arrest was without probable cause". He contends that under current Texas law, where a warrantless search is based upon an informant's tip, the two-pronged Aguilar test must be met. Aguilar v. State, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). More specifically, appellant asserts that the informant's tip in this case was insufficient to establish probable cause for appellant's arrest because no evidence was introduced establishing how the officer had obtained his information from the informant.

Appellant also asserts in his second ground of error that there was

insufficient evidence to establish the credibility of the informant. Appellant argues that Officer Furstenfeld's mere assertion that his informant was reliable is an insufficient basis for establishing probable cause for a warrantless arrest.

[1-3] An anonymous telephone call does not, in itself, provide sufficient basis for a warrantless arrest or search as evidence must also be introduced establishing why the officer deemed the informant credible and the information reliable. Evidence and standards applicable to the assessment of probable cause for a warrantless arrest and search are at least as stringent as the standards applied for the issuing of an arrest or search warrant. Wilson v. State, 621 S.W.2d 799 (Tex.Crim.App.

1981). Under Texas law, an affidavit for a search warrant based upon hearsay must satisfy the two-prong test that the magistrate be informed of the underlying circumstances which render the information reliable and that he be informed of specific factual allegations which render the source of the inforamtion reliable. Tex. Code Crim.P. Art. 18.01 (Vernon 1977); Winkles v. State, 634 S.W.2d 289 (Tex.Crim. App. 1982). Glass v. State, 681 S.W.2d 599 (Tex.Crim.App. 1984).

[4] In the present matter, the officer testified that he had never received any information from the informant previous to the phone conversation of February 16, 1982. He had no idea whether the information was accurate when he acted upon it, and he testified

that the informant himself had never seen the cocaine the appellant was to obtain. According to the officer, all the informant knew was that "a person was supposed to go to Miami and obtain some cocaine". There was no testimony as to the credibility of the informant or even an affirmative showing that the officer had previously received information from the informant.

Appellant's first and second grounds of error are sustained.

Appellant asserts through his third ground of error that there was insufficient evidence to establish that appellant had committed an offense so there was no probable cause for the arrest.

The record contains testimony by Officer Furstenfeld that when confronted

at the airport appellant appeared nervous. However, as pointed out in Glass v. State, 681 S.W.2d 599 (Tex. Crim.App. 1984), "in this day and time when a citizen is suddenly facing an imminent confrontation with police officers for unknown reasons, most citizens with nothing to hide will nevertheless manifest an understandable nervousness in the presence of the officer."

[5] Additionally, in Wilson v. State, 621 S.W.2d 799, the court held that police officers who had received information from an informant that the defendant would be going to a phencyclidine lab and would be driving a particular truck, did not have probable cause to arrest the defendant or to conduct a search. In Ebarb v. State, 598 S.W.2d

842 (Tex.Crim.App. 1978), the court stated that it "behooved" the trial court to suppress evidence obtained when the "specific and articulable" circumstances which justify the investigatory stop were based solely on the tip of an informant. Clearly, an anonymous telephone call would provide sufficient justification for police officers to initiate an investigation, but it will not justify a warrantless arrest or search. Clemons v. State, 605 S.W.2d 567 (Tex.Crim.App. 1980).

[6,7] Texas cases have consistently held that not only must the information received from an informant be specific enough to render it reliable, but that there must be allegations of such a specific and factual nature to conclude that the source was credible.

Tolentino v. State, 638 S.W.2d 499 (Tex.Crim.App. 1982); Wilson v. State, 621 S.W.2d 799 (Tex.Crim.App. 1981); Green v. State, 615 S.W.2d 700 (Tex.Crim.App. 1981); Kleasen v. State, 560 S.W.2d 938 (Tex. Crim.App. 1978). Texas cases further hold that a search conducted without a warrant issued on probable cause is per se unreasonable. Nastu v. State, 589 S.W.2d 434 (Tex.Crim.App. 1979) cert. denied 447 U.S. 911, 100 S.Ct. 3000, 64 L.Ed.2d 862). Evidence seized as a result of any legal detention without probable cause should be suppressed. See Jones v. State, 567 S.W.2d 209 (Tex. Crim.App. 1978). Appellant's third ground of error is sustained.

Appellant's fourth ground of error also addresses the illegality of the

search by asserting that there was ample time to procure an arrest warrant. However, in view of our conclusion that there was not probable cause for the arrest or search, this ground need not be addressed.

[8-10] In appellant's fifth ground of error, he claims that there was insufficient evidence to establish his consent to the search. We agree and sustain this ground of error. A consent to search must be free and voluntary in light of the totality of the circumstances, and such consent is vitiated if granted only in submission to a claim of lawful authority. Green v. State, 594 S.W.2d 72 (Tex.Crim.App. 1980). Whether such consent is voluntary must be proven by clear and convincing evidence, and it is a question of fact whether the

accused gave positive and unequivocal consent. Kolb v. State, 532 S.W.2d 87 (Tex.Crim. App. 1976).

In the instant case appellant was intercepted by four officers. The officers told him that they knew he had gone to Miami to purchase cocaine and believed it to be on his person or in his bag. Appellant was asked several times where the contraband was. Although the officers indicated that appellant could withhold consent and force them to get a search warrant, they immediately searched his bag without consent of any kind. The clear implication was that, contrary to the assertion that consent could be withheld as a practical matter, consent was immaterial. Furthermore, after completion of the unsuccessful search of the bag, the

officers indicated that they intended to begin to search his person when they commented that the contraband was probably in his sock. At this point one officer told appellant to "give it up" because he had been "caught." Another officer continued to question appellant as to where the cocaine was. In fact, the record reveals that the officer stated that he would not permit appellant to leave the scene in the event that he would require the officers to secure a search warrant. It was only after the search of his bag without consent and the statement that appellant should "give it up" that appellant handed over his jacket and stated, "It's in the pocket".

Appellant argues that because he never gave a positive statement indicat-

ing his consent to search, the trial court erred in failing to suppress the evidence since the consent to search was obtained through the exploitation of an illegal arrest. We agree. After examining the totality of the circumstances, we conclude that after the appellant was told to "give it up", he simply acquiesced to lawful authority and complied with the unequivocal demand. From the record as a whole, we find the evidence to be insufficient to support a finding that consent was voluntarily given. See Kolb v. State, 532 S.W.2d 87.

[11] In his sixth ground of error, appellant asserts that the trial court erred in failing to suppress the evidence because appellant's consent to search was secured through the exploita-

tion of his illegal arrest. As stated above, any purported "consent" was given in direct response to the officer's demand for the alleged contraband, under claim of lawful authority, and, hence, was acquire through exploitation of his illegal arrest. Lee Green v. State, 615 S.W.2d 700 (Tex.Crim.App. 1980).

Appellant's sixth ground of error is sustained.

The judgment below is reversed and the cause is ordered dismissed.

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
_____ TERM, 1988

LEE WARREN EISENHAUER,
Petitioner/Appellant,

vs.

STATE OF TEXAS,
Respondent/Appellee.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

SAM P. BRADLEY
100 North Main Bldg. #3002
Memphis, TN 38103
[901] 525-8271
Counsel for Petitioner/Appellant

DAVID D. SILBERBERG
Counsel of Record for Filing
A Member of the Bar of the
United States Supreme Court
100 North Main Bldg. #3002

June, 1988

APPENDIX D

This appeal is from a conviction for possession of a controlled substance, to-wit: cocaine. Following appellant's plea of nolo contendere before the Court, punishment was assessed at six years' imprisonment, probated, and a fine of $2,000.

Prior to the bench trial, appellant filed a pretrial motion to suppress. Only one police officer testified at the hearing and the motion was overruled. Thereafter, appellant entered his nolo contendere plea and the evidence seized as a result of the search was utilized to support his plea and the judgment. See Article 1.15, V.A.C.C.P. After conviction, appellant appealed only the denial of the pretrial motion to sup-

press, which was permissible under Article 44.02, V.A.C.C.P.[1]

In Eisenhauer v. State, 657 S.W.2d 184 [Tex.App. - Houston (1st. Dist.) 1983] (hereinafter "Eisenhauer I"), the same search and seizure being tested before the Court today was the subject of a Federal Constitutional challenge. The Court of Appeals found that the arrest of the appellant was not supported by probable cause and, as a result, the fruits of the subsequent search were inadmissible. The decision was based solely on Federal Constitutional grounds, to which the Court of Appeals incorrectly applied the rule of Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). This Court granted review of the Ei-

[1] We have adopted the succinct statement of facts presented by Presiding Judge Onion in this Court's prior opinion.

senhauer I decision in Eisenhauer v. State, 678 S.W.2d 947 (Tex.Cr.App. 1984) (hereinafter "Eisenhauer II"). Presiding Judge Onion, writing for the majority, concluded that the Court of Appeals' application of the Aguilar two-prong test was erroneous, as the Federal law rested on the rule of Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527, rehearing denied, 463 U.S. 1237, 104 S.Ct. 33, 77 L.Ed.2d 1453 (1983), which required review of the totality of circumstances. This Court was careful to point out that both Eisenhauer I and Eisenhauer II rested entirely upon Federal grounds.

After reversing the Court of Appeals in Eisenhauer II, this Court remanded the case for consideration of appellant's grounds of review based on state law. The remand resulted in yet

another decision styled Eisenhauer v. State, 684 S.W.2d 782 [Tex.App. - Houston (1st Dist.) 1984] (hereinafter "Eisenhauer III"). In Eisenhauer III, the Court of Appeals was faced with the task of determining whether probable cause for the search and seizure existed under Texas law. In concluding that the arrest was illegal, the Court of Appeals again applied the analysis of Aguilar v. Texas, supra. From this ruling, the State filed a petition for discretionary review which was granted by this Court to determine:

(1) Whether appellant sufficiently preserved State law grounds for review;

(2) Whether it was error for the Court of Appeals to apply the rule in Aguilar to probable cause determinations based on State law, and

(3) Whether probable cause existed under Texas law.[2]

We now reverse the decision of the Court of Appeals and affirm the judgment of the trial Court.

The first point that must be addressed is whether appellant sufficiently preserved the State law point of error for review. Before his trial at the bench, appellant filed a written motion to suppress. It stated, inter alia, that: "Defendant was arrested without a warrant and without probable cause in violation of the IV, V and XIV Amendments to the Constitution of the United States and in violation of the laws and Constitution of the State of Texas." At

---

[2] In light of the Court's disposition of the issues, it becomes unnecessary for us to reach a fourth point of error presented by the State as to whether appellant gave consent to the search in question.

the hearing on the motion, appellant's attorney objected to the arrest only on Federal grounds, stating: "We are dealing with Draper-Aguilar-Spinelli situations...". The State argues the above quoted language, even taken in light of the written motion, is insufficient to preserve the error for review on appeal.

Though it has long been the rule that a general or imprecise specific objection is insufficient to preserve error for appeal, where the grounds of the objection are obvious to the Court or the opposing counsel, the error will not be waived. Carter v. State, 717 S.W.2d 60 (Tex.Cr.App. 1986); Samuel v. State, 688 S.W.2d 492 (Tex.Cr.App. 1985); Zillender v. State, 557 S.W.2d 515 (Tex.Cr.App. 1977). We find this latter exception to be controlling in the case at bar. The clear thrust of appellant's chal-

lenge was directed toward the propriety of the warrantless arrest and subsequent search. Article I, Section 9 of the Texas Constitution is directly on point. Failure to explicitly state "Article I, §9" should not be an impediment to review, particularly where, as here, the Court remanded the case to the Court of Appeals for the specific purpose of hearing appellant's state law points of error.

It has also been held that a timely-filed motion to suppress will be sufficient to preserve error even without oral argument at the suppression hearing. Vicknair v. State, 670 S.W.2d 286 [Tex.App. - Houston (1st Dist.) 1984] (review refused). It logically follows that a motion to suppress will be sufficient to preserve an alleged error where the oral argument covers some, but not all, of the grounds raised in the motion.

This is not like the situation presented in Nelson v. State, 607 S.W.2d 554 (Tex.Cr.App. 1980), in which this Court held the State law grounds urged by the defendant for the first time on appeal had not been properly preserved for review since both the objection and the motion to suppress were based solely on Federal grounds. The State's first ground of review is overruled.

The State next poses the following ground of review: "The First Court of Appeals erred in holding that under Texas law probable cause based upon hearsay must satisfy the two-prong test of Aguilar v. State (sic), 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)."

This case presents the Court with the first clear-cut opportunity since the United States Supreme Court handed down Illinois v. Gates, supra, to

establish a uniform guideline for determining the existence of probable cause under the constitution and laws of the State of Texas. While numerous cases have dealt with probable cause determinations, our research indicates the vast majority have dealt solely with Federal Constitutional issues. Very few cases presented before this Court have sought redress on State law grounds, and even fewer have resulted in decisions based upon the independent law of the State of Texas. See, e.g., Marquez v. State, 725 S.W.2d 217 (Tex.Cr.App. 1987); Ware v. State, 724 S.W.2d 38 (Tex.Cr.App. 1986); Cassias v. State, 719 S.W.2d 585 (Tex.Cr.App. 1986).

The opinion of the Court of Appeals in Eisenhauer III relies on the Aguilar-Spinelli analysis, despite the existence of a contrary Federal standard.

It is important to note that the Court of Appeals cites no authority for this conclusion.[3] Moreover, research indicates that this Court has never stepped forward to adopt affirmatively the two-pronged Aguilar-Spinelli test as THE method of assessing probable cause under the constitution and laws of the State of Texas.[4] Finding valid precedent lacking, it is up to this Court to make a pronouncement as to the proper State model for assessing probable cause. In doing so, we must analyze the nature

---

[3] Indeed, this Court, in Eisenhauer II, specifically reserved judgment on the assertion of the Court of Appeals in Eisenhauer I that Texas followed Aguilar-Spinelli.

[4] In Marquez v. State, supra, in was stated that "this state has always used Aguilar-Spinelli." In that case the Court found it unnecessary to address the question of which test would be used in Texas as the affidavit in question was found to satisfy both Aguilar and Gates, supra.

and extent of the protections offered by the Texas Constitution, the statutory pronouncements of the Legislature, and the interpretive caselaw.

An examination of Article I, §9, supra, reveals that it is virtually identical to its Federal Constitutional counterpart, the Fourth Amendment. Article I, §9 reads as follows:

> "The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures and searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

The Fourth Amendment states:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Article I, §9 of the Constitution of this State, and the Fourth Amendment of the Federal Constitution are, in all material aspects, the same. Brown v. State, 657 S.W.2d 797 (Tex.Cr.App. 1983); Crowell v. State, 180 S.W.2d 343 (Tex.Cr.App. 1944); Daniel v. State, 704 S.W.2d 952 (Tex. App. - Fort Worth 1986). The arguments for greater protections advanced here must be addressed on the basis of interpretive caselaw or legislative pronouncements.

A review of the procedures used by this Court in the past for determining probable cause provides little, if any, guidance. During the period of time between Aguilar (1964) and Gates (1983), this State followed the lead of the United States Supreme Court and tacitly applied the Aguilar-Spinelli test to challenges based both

on Federal and State law. See, e.g., Jones v. State, 640 S.W.2d 918 (Tex.Cr.App. 1982); Green v. State, 615 S.W.2d 700 (Tex.Cr.App. 1980); Kleasan v. State, 560 S.W.2d 938 (Tex.Cr.App. 1977). However, the line of cases following the Aguilar-Spinelli model cannot be said to demonstrate, in and of themselves, judicial preference for a broader interpretation of Article I, §9 which provides greater protections than the Fourth Amendment. As this Court stated in Brown v. State, supra: "We ... decline [defendant's] invitation to attach to Article I, Section 9 of our Texas Constitution a more restrictive standard of protection than provided by the Fourth Amendment." See also Osban v. State, 726 S.W.2d 107 (Tex.Cr.App. 1986); Daniel v. State, supra; Andrada v. State, 695 S.W.2d 230

(Tex.App. - Corpus Christi 1985); Kann v. State, 694 S.W.2d 156 (Tex.App. - Dallas 1985).

Argument that this Court has adopted Aguilar-Spinelli by implication is also without merit. Lacking a positive pronouncement adopting Aguilar-Spinelli, it can be argued with equal force that this Court has applied the two pronged test only because Federal law demanded it.[5] The fact that this Court has consistently applied the totality of the circumstances analysis to probable cause challenges since Gates supports

---

[5] Take the pre-Gates decision Wright v. State, 646 S.W.2d 460 (Tex.Cr.App. 1983). In testing the sufficiency of an affidavit, the Court noted: "We must be ever mindful that we stay within the boundaries of constitutional requirements as prescribed by the United States Supreme Court in Aguilar."

this conclusion.[6] As caselaw fails to provide a clear answer to the question, an examination of the relevant statutory authority is appropriate.

In deciding there was insufficient probable cause to support the arrest in this case, the Court of Appeals specifically relied on Article 18.01(b), V.A.C.C.P. In effect, holding that

---

[6] Both in cases based solely on Federal grounds, see e.g. Angulo v. State, 727 S.W.2d 276 (Tex.Cr. App. 1987); Armstrong v. State, 718 S.W. 2d 686 (Tex.Cr.App. 1985); Bellah v. State, 653, S.W.2d 795 (Tex.Cr.App. 1983), and cases based on State and Federal grounds, see e.g. Hennessy v. State, 660 S.W.2d 87 (Tex.Cr.App. 1983), and cases in which the record does not reflect whether State or Federal grounds were determinative, see e.g., Thomas v. State, 701 S.W.2d 653 (Tex.Cr.App. 1985); Whaley v. State, 686 S.W.2d 950 (Tex.Cr.App. 1985); Glass v. State, 681 S.W.2d 599 (Tex.Cr.App. 1984); Spencer v. State, 672 S.W.2d 451 (Tex.Cr.App. 1984); Wright v. State, 646 S.W.2d 460 (Tex.Cr.App. 1983); cf. Marquez v. State, supra.

"...the two-pronged Aguilar test must be met." In support of their position, the Court of Appeals cites Winkles v. State, 634 S.W.2d 289 (Tex.Cr.App. 1982), and Glass v. State, 681 S.W.2d 599 (Tex.Cr.App. 1984). Though the entire analysis in Winkles v. State, supra, is based on the requirements of Aguilar, the opinion contains no mention of any independent State grounds of review. Therefore, it cannot be said to be persuasive authority to a claim based on State law. Moreover, the citation of Glass v. State, supra, actually undermines the position of the Court of Appeals since Gates, and not Aguilar is mentioned as an example of what is necessary to establish probable cause.

A comparison of the language of Article 18.01, supra, with the language of Aguilar reveals that the Statute

neither follows nor incorporates the two-prong test. Article 18.01(b) reads:

> "No search warrant shall issue for any purpose in this State unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth facts establishing probable cause shall be filed in every instance in which a search warrant is requested...."

Aguilar states:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed was 'credible' or his information 'reliable'". (Citations omitted). Aguilar v. State, supra, at 1514.

In his brief, appellant asserts:

> "[T]he sufficient basis for a finding of probable cause referred to in Aguilar is

> the historic Aguilar test. The use of the words 'sufficient facts' in the 1965 amendments to Article 18.01 accompanied by the commentaries patently establishes a legislative intent to incorporate Aguilar as part of independent state law."

We find this argument neither persuasive nor sound. While the Legislature modified the language of Article 18.01 in 1965 after the Aguilar v. Texas decision by the Supreme Court, it does not necessarily follow that the Legislature intended to adopt the Aguilar two-prong analysis.[7] If anything, these actions are congruous with a pattern of following the lead of the United States Supreme Court in interpreting search and seizure issues.

---

[7] After all, in Aguilar v. Texas, supra, the Supreme Court found the then-existing Texas probable cause analysis violative of the Federal Constitution. It should surprise no one that the Legislature acted to bring State law into line with the constraints of the United States Constitution.

For authority, appellant refers almost exclusively to the commentaries that accompany Article 18.01, supra.[8]. It is true that Judge Morrison in this "Interpretive Commentary" under Article 18.01 observed that the Supreme Court had recently invalidated some Texas convictions because the affidavits for search warrants "did not contain sufficient facts to satisfy the magistrate that probable cause did in fact exist...". And it is likewise true that Presiding Judge Onion in his "Special Commentary" cites Aquilar; but he confines his reference to the basic requirement of Aquilar that "there must be sufficient facts present...". Nowhere do Judge Morrison or Judge Onion mention the two prongs of Aquilar or make any statement to the effect that

---

8 We quote liberally from the State's Attorney's brief on this issue.

such analysis was intended to be incorporated in the Statute.

This Court had the opportunity to interpret Article 18.01(b), supra, in light of Aguilar in Hennessy v. State, 660 S.W.2d 87 (Tex.Cr.App. 1983). In Hennessy, the defendant alleged that a search warrant was invalid because the underlying affidavit "failed to satisfy the probable cause requirements of Aguilar v. Texas... and Article 18.01(b), V.A.C.C.P." this Court held that the affidavit was sufficient under the Gates analysis. We find the reasoning of Hennessy sound and reaffirm that decision. Gates' standards and principles should be applied in determining whether

the demands of Article 18.01(b) have been met.[9]

The application of Gates is in no way repugnant to Article 18.01, supra. The ultimate inquiry of Article 18.01 concerns the existence of probable cause, which must be established by "sufficient" and "substantial" facts. Aguilar v. Texas, supra; Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), and Illinois v. Gates,

---

[9] The Hennessy decision has been widely recognized by the Courts of Appeals as adopting Gates into Texas jurisprudence. See e.g., Ellis v. State, 722 S.W.2d 192 (Tex.App. - Dallas 1986); Roldan v. State, 698 S.W.2d 741 (Tex.App. - Beaumont 1985); Correll v. State, 696 S.W.2d 297 (Tex.App. - Fort Worth 1985); Andrada v. State, 695 S.W.2d 230 (Tex.App. - Corpus Christi 1985); Elliot v. State, 681 S.W.2d 98 [Tex.App. - Houston (14th Dist.) 1984], affirmed 687 S.W.2d 359 (Tex.Cr.App. 1985); Garcia v. State, 676 S.W.2d 202 (Tex.App. - Corpus Christi 1984), pet. ref'd.

supra, do not change the basic underlying rule. The only things that have changed are the measures which the Supreme Court created to aid in arriving at a determination of the existence of sufficient facts to show probable cause. Under Aguilar-Spinelli, the measure was the two-prong test. In Gates, the measure is the totality of the circumstances. Only the methodology of determining if the basic rule has been satisfied has been changed, not the basic rule itself. Gates, like Article 18.01, continues the demand for sufficient and substantial facts.

The fact that the arrest in the instant case was made without a warrant is irrelevant to the probable cause analysis. The totality of the circumstances approach applies to warrantless as well as warrant seizures of persons and property. United States v.

Mendoza, et al., 722 F.2d 96 (5th Cir. 1983); Angulo v. State, 727 S.W.2d 276 (Tex.Cr.App. 1987); Whaley v. State, 686 S.W.2d 950 (Tex.Cr.App. 1985); Eisenhauer v. State, 678 S.W.2d 947 (Tex.Cr.App. 1984).

It is to be remembered that adoption of the analysis of Gates does not mean abandoning Aguilar-Spinelli. Gates did not dispense with the two requirements used in the Aguilar-Spinelli test. Rather, in Illinois v. Gates, supra, the United States Supreme Court criticized the strict application of the two prongs of Aguilar-Spinelli, stating that although the veracity and basis of knowledge of the informant are highly relevant factors:

> "These elements are not to be understood as entirely separate and independent requirements to be rigidly exacted in every case. (103 S.Ct. at 2327.)
>
> * * *

> "Instead they are better understood as relevant considerations in the totality of circumstances analysis that traditionally has guided probable cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some indicia of reliability. (103 S.Ct. at 2329.)

See also Whaley v. State, supra; Hennessy v. State, supra.

In conclusion, Aguilar was not followed in Texas in order to satisfy Article I, Section 9 of the Texas Constitution or Article 18.01, V.A.C.C.P.; it was followed because Federal law demanded it. Federal law no longer demands it. In this area, the laws and constitution of the State of Texas impose no greater restrictive standard, leaving the Texas Courts free to follow the lead of the Supreme Court of the United States. There being no binding authority to the contrary, today's opinion is made to

stay in step with the Federal Constitutional model for probable cause determinations.

The duty of the reviewing Court is to look to the totality of the circumstances to determine if there exists a substantial basis for concluding that probable cause existed at the time of the questioned action. Angulo v. State, supra, at 278. In Eisenhauer II, applying the totality of the circumstances analysis to appellant's Federal Constitutional claim, this Court concluded that there was a substantial basis for determining probable cause in the arrest and search of the appellant. It logically follows that there is no necessity for another remand to the Court of Appeals.

The judgment of the Court of Appeals is reversed and the judgment of the trial court affirmed.

McCormick, Judge

(Delivered March 23, 1988)

En Banc

Publish

LEE WARREN EISENHAUER, Appellant, NO. 149-85 VS THE STATE OF TEXAS, Appellee.	Petition for Discretionary Review from the Court of Appeals, First Supreme Judicial District of Texas (HARRIS County)

CONCURRING OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

I concur with the majority's conclusion that neither Article I, §9 of the Texas Constitution nor Article 18.01, V.A.C.C.P. require that an affidavit based upon hearsay must comport with the Aguilar-Spinelli doctrine. Further, I find that Judge McCormick's textual analysis, in this instance, review of prior state case law, and the applicable state statute appropriate and commendable. These are the methods of review, among others, that this Court should follow in examining our Constitution. See Hans Linde, "E Pluribus -- Constitutional Theory and State Courts",

in Developments in State Constitutional Law: The Williamsburg Conference, ed. Bradley D. McGraw (St. Paul, Minn.: West Publishing Co., 1985) pp. 227-305.

However, I do object to the majority's comment that his case was decided as it was in order "to stay in step with the Federal Constitutional model for probable cause determinations." There is no constitutional requirement that this Court specifically adopt either the reasoning or the holding in Illinois v. Gates, 462 U.S. 213 (1983). Consequently, there is no reason for this Court to feel compelled to "stay in step with the federal constitutional model for probable cause determinations."

The United States Supreme Court is not the infallible institution that this Court on occasion has assumed it to be. For example, a plurality of this Court

in Brown v. State, 657 S.W.2d 797 (Tex.Cr.App. 1983) stated: "[T]his Court has opted to interpret our Constitution in harmony with the Supreme Court's opinions interpreting the Fourth Amendment." Id., at 799. Osban v. State, 726 S.W.2d 107 (Tex.Cr.App. 1986). I am unwilling to be so arbitrarily submissive.

Because the Supreme Court is not invested with divine guidance, there is nothing inherently improper in state court opinion diverging from Supreme Court authority on the very simple basis that there is a viable disagreement on the matter of interpretation. As Professor Robert Williams has commented: "Our system of federalism has always contemplated such disagreement." Robert F. Williams, In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme

Court Reasoning and Result, 35 S.C.L. Rev. 353, 368 (1984).

If I had concluded that Article I, §9 of the Texas Constitution or Article 18.01 V.A.C.C.P. required strict adherence to the Aguilar-Spinelli doctrine, I would not hesitate to so state despite Illinois v. Gates, supra.

With these comments I concur.

M.P. Duncan, III

(Delivered March 23, 1988)

En Banc

Publish

Miller & Campbell, JJ., join

LEE WARREN EISENHAUER, Appellant, NO. 149-85 VS THE STATE OF TEXAS, Appellee.	Petition for Discretionary Review from the Court of Appeals, First Supreme Judicial District of Texas (HARRIS County)

CONCURRING OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

I concur in the opinion by Judge McCormick. It is with reluctance that I add another opinion to those already extant in this cause. I am compelled to do so in view of the serious misinterpretation by the dissenting opinions of my Special Commentary to Article 18.01 V.A.C.C.P., written more than 22 years ago. Thank God I am still around to prevent my commentary from being used to mean something that was never intended.

Article 304, V.A.C.C.P. (1925), provided:

> "A 'search warrant' is a written order, issued by a magistrate, and directed to a peace

> officer, commanding him to search for personal property, and to seize the same and bring it before such magistrate, or it is a like written order, commanding a peace officer to search a suspected place where it is alleged stolen property is commonly concealed, or implements kept for the purpose of being used in the commission of any designated offense."

An examination of the early drafts of the State Bar Committee on the Revision of the Code of Criminal Procedure (1925) on which Judges Erisman, Morrison and I served showed that in 1962 and 1963 it was proposed to bring Article 304 forward unchanged as Article 18.01 of any new Code of Criminal Procedure. In 1964 the decision in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), was handed down.

Thereafter, it was recommended by the said State Bar Committee that an additional paragraph without section or

subsection numbers be added to the proposed Article 18.01 as follows:

> "No search warrant shall issue for any purpose in this State unless a sworn complaint therefor shall first be filed with the issuing magistrate setting forth sufficient facts to satisfy the magistrate that probable cause does in fact exist for its issuance."

The recommendation or addition was made because of the holding in Aguilar, that sufficient facts must be presented to the magistrate to satisfy him that probable cause does in fact exist for the issuance of a search warrant. The two-prong test of Aguilar for determining probable cause was not, however, written into the change to proposed Article 18.01 by the said State Bar Committee.

The recommendations of the State Bar Committee as to revision of the 1925 Code of Criminal Procedure were made to the Legislature, including the one as to

Article 18.01 in 1965. Thereafter, a new Code of Criminal Procedure was adopted by the Legislature. Acts 1965, 59th Leg., ch. 722, effective January 1, 1966. Article 18.01, without change from the recommendations from the State Bar Committee, was adopted by the Legislature as a part of the new code. While it could have, the Legislature did not write into statute the two-prong test of Aguilar.

In 28 Texas Bar Journal 727, 795 (1965), Onion, Commentary on the Revised Code of Criminal Procedure, this writer wrote:

> "The United States Supreme Court in Aguilar v Texas, 378 US 108, 84 S.Ct. 1509, voided a Texas search warrant based merely upon 'reliable information', and held that there must be sufficient facts presented to satisfy the magistrate that probable cause does in fact exist for the issuance of a search warrant.
>
> "The new code has been reworded to meet these requirements.

> Therefore the affiant (usually a police officer) in an affidavit for a search warrant can no longer merely state that he has received reliable information from a credible person (usually unnamed) that an offense has been committed, etc. The affidavit must show the magistrate (Justice of the Peace in most cases) additional facts to form a sufficient basis in fact for a determination by the magistrate that probable cause exists for the issuance of a search warrant." (Authorities cited omitted.)

An attempt was made to show the influence of Aguilar upon the change made in the language of old Article 304 when it became 18.01, but there was no claim made that the two-prong test had been statutorily adopted.

The Special Commentary to Article 18.01, V.A.C.C.P. (See Vol. 1, p. 315, 316), was in the same language as the Bar Journal.

I have reread the Interpretive Commentary to Article 18.01 by the late Judge W.A. Morrison of this Court and

that of the late Judge Fred Erisman of Longview, Chairman of the State Bar Committee. I cannot agree that they are contrary to my commentary.

I am fully aware of the results that Judges Clinton and Teague would like to reach in this case, and I respect their views, but sadly they misinterpret my commentary upon which they seek to rely.

ONION, Presiding Judge

(Delivered March 23, 1988)

En Banc

Publish

LEE WARREN EISENHAUER, Appellant, NO. 149-85 VS THE STATE OF TEXAS, Appellee.	Petition for Discretionary Review from the Court of Appeals, First Supreme Judicial District of Texas (HARRIS County)

DISSENTING OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

"Texas is a free and independent State, subject only to the Constitution of the United States", Article I, §1, Bill of Rights, Constitution of The State of Texas. The Tenth Amendment specifically provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[1]

Thus, here today we are dealing with the very sovreignty of the State of Texas and the basic integrity of this Court as a repository and keeper of that

sovreignty in criminal law matters. With Chief Justice Marshall, we must "never forget that it is a constitution we are expounding," McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, at 407 (1819), and "as to the true scope of the Texas Constitution, we must ultimately follow our own lights," Olson v. State, 484 S.W.2d 756 (Tex.Cr.App. 1972) (Opinion on Rehearing).

The Fourth Amendment to the Constitution of the United States "sought to guard against an abuse that more than any one single factor gave rise to American independence," Harris v. United States, 331 US 145, 67 S.Ct. 1098, 91 L.Ed. 1013 (1947) (Justice Frankfurter dissenting, at 159, S.Ct., at 1105). Yet, it provides no more than minimum safeguards against unreasonable searches and seizures and for warrants upon probable cause. States may not

infringe on federal constitutional guarantees, but they have full power and complete authority to provide greater protection to the citizenry. Milton v. State, 549 S.W.2d 190, at 192 (Tex.Cr.App. 1977); see Olson v. State, supra, at 762, and authorities cited in note 2, post.

Elsewhere I have chronicled "the separate life of Article I, §9." Brown v. State, 657 S.W.2d 797, 806 n. 27 (Tex.Cr.App. 1983) (Clinton, J., concurring). Now, the majority merely reads §9 along with the Fourth Amendment, and is content to say that because the language is "in all material respects, the same", arguments for greater protections "must be addressed on the basis of interpretive caselaw or legislative pronouncements". Slip opinion, at 6. However, that simplistic notion would preclude consideration of enduring

principles of "federalism", as well as relevant policy considerations.[2]

Moreover, simply to compare language indicates that the majority has lost its sense of history.

Declarations of rights or bills of rights came first in constitutions of many states -- before there was a Constitution of the United States of America. The "most influential" was the Virginia Declarations of Rights framed by George Mason; it became "almost the copybook for other states[.]" B. Mitchell & L.P. Mitchell, A Biography of the Constitution of the United States (2nd Ed.) Oxford University Press, New York; 1975, at 196-197. But on the subject of protection from governmental intrusion, the model was laid in Article XVI of the 1780 Constitution of the Commonwealth of Massachusetts where in 1761 James Otis had made such moving argument against

general warrants that John Adams was inspired to declaim, "American independence was then and there born." Harris v. United States, supra, (Frankfurter dissenting, at 157, 159, S.Ct., at 1104, 1105.

Among delegates to the constitutional convention of 1787 were Eldbridge Gerry of Massachusetts and James Madison of Virginia; both were also members of the First Congress. During the course of ratification of the proposed Federal Constitution there was a clamor for inclusion of declarations of individual rights and liberties. In the First Congress Madison introduced a set of resolutions mostly taken from Virginia Declarations of Rights. However, with Gerry he drew on Article XIV of the Massachusetts Constitution to draft the one that would become the Fourth Amendment in 1791 when the Bill of Rights was formally made a

part of the Constitution. Harris v. United States, supra (Frankfurter dissenting, at 158, S.Ct. at 1105); for its legislative history, see The Constitution of the United States, U.S. Government Printing Office, Washington: 1973, at 1041-1043[4]

In due course other states were formed from territories and admitted to the Union. Contrary to popular belief those states did not necessarily use the federal Constitution as a model for their own; rather, they turned mainly to their territorial charters or to constitutions of other states. Comment, Individual Rights and State Constitutional Interpretations: Putting First Things First, 37 Baylor L.Rev. 493, at 497 (Spring 1985). By 1938 the constitution of every State contained a clause "like that of the Fourth Amendment and often

in its precise wording." Harris, supra, at 160, S.Ct. at 1106.

Even then, of course, guarantees in the Federal Bill of Rights were not intended to and did not protect against "state action". Barron v. Mayor of Baltimore, 32 US (7 Pet.) 242 (1833): "These amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them." Id., at 250. Accord: Spies v. Illinois, 123 US 131, 166, 8 S.Ct. 21, 24, 31 L.Ed. 80 (1887)[5] Thus, over a span of one hundred years fundamental rights to privacy and protections against arbitrary intrusion by state and local government were secured only to the extent granted and provided by state constitutions. See, Comment, op. cit., supra, at 497, citing Newman, The "Old Federalism": Protection of Individual

Rights by State Constitutions in an Era of Federal Court Passivity," 15 Conn. L. Rev. 21, at 22 (1983).

In 1832 early Texans, seeking separation from the State of Coahuila, convened in San Felipe de Austin and drew up a proposed constitution modelled on the Massachusetts Constitution of 1780. Comment, supra, at 497, n. 38; Interpretive Commentary following Preamble to Texas Constitution of 1876; 1 Vernon's Texas Constitution 198 (Vernon 1955) (Interpretive Commentary). Stephen F. Austin undertook a mission to Mexico City to present the proposed constitution and related petitions, and was clapped into jail.

Along with others that development produced grievances aired at other conventions in October, 1834. Introduction to Constitutions of Texas, 3 Vernon's Texas Constitution (Vernon 1955) 507

(Introduction). Increased disaffection with the national government caused representatives of municipalities to convene again at San Felipe de Austin in November, 1835; they declared a state of war and created a Provisional Government for Texas. Ibid. See id., at 509 and 511.[6]

Their grievances were more formally enumerated March 2, 1836, in the Declaration of Independence from Mexico.[7] Within two weeks they had formulated and adopted the Constitution of the Republic of Texas. 3 Vernon's Texas Constitution (Vernon 1955) 523 ff.

That Constitution mandated the Congress to introduce by statute the common law of England "with such modifications as our circumstances, in their judgment Congress to introduce by statute the common law of England "with such modifications as our circumstances, in their

judgment may require", and provided that "in all criminal cases the common law shall be the rule of decision". Article V, §13. In a schedule it was declared that "all laws now in force in Texas, and not inconsistent with this Constitution, shall remain in full force, until declared void, repealed, altered, or expire by their own limitation." Schedule, §1.[8] The preamble to the Declaration of rights makes the Declaration a part of the Constitution and declares it shall "never be violated on any pretence whatever", and in order to guard against "the transgression of the high powers" [delegated elsewhere], declared that "everything in this bill of rights....is reserved to the people."

When thus examined in "our own lights", the fact that provisions of §9 and the Fourth Amendment "are, in material aspects, the same", proves nothing.

Justice Frankfurter remarked in Harris, supra, at 1104, that "one's views regarding [given circumstances in a case] ultimately depend upon one's understanding of the history and the function of the Fourth Amendment."[9] So here is needed a similar understanding of §9; correctly comprehended, that §9 reads like the Fourth Amendment is merely a coincidence of historical facts.

There is no indication that Framers drew on the Fourth Amendment rather than a similar declaration from a state or territory. Texans had no reason to have more than a civil interest in the Fourth Amendment: It could not provide any protection whatever to citizens of The Republic of Texas; even after Texas joined the Union, the Fourth Amendment remained a restriction alone on the federal government until long after the present Constitution of 1876 was adopted.

Therefore, the issue cannot be whether the Framers were seeking "greater protection" than provided by the Fourth Amendment against arbitrary invasions of privacy by government. Rather, the question must be what protection did the Framers contemplate was independently vouchsafed by their own Constitution. Comment, supra, at 509.

As we have seen, early Texans resisted just such invasions, demanded in strongest terms protection against abuse of power, fought for their rights and, winning their freedom, created and established their own form of government -- a free, sovereign and independent republic. From many sources they framed a constitution; then, understanding and appreciating that "transgression of the high powers" being delegated to The Republic of Texas must be prevented, the Framers particularized in the Declaration of

Rights every right then deemed worthy of protection, "never [to] be violated on any pretence whatever." That is to say, not to be violated by governmental authorities of the Republic. There being no provider from any other source of protection against abridgement by officers of departments of government, they created a judicial department and charged it to enforce those rights in accordance with the common law of England, as well as all extant laws of Texas not inconsistent with the Constitution -- not the Constitution of the United States.[10]

Nevertheless, disdaining its genesis because the language of §9 and the Fourth Amendment are substantially the same, in accepting wholesale the Supreme Court's "totality of the circumstances" approach to evaluating the reliability of hearsay tendered to show probable

cause under §9, the majority proceeds on two bases. First, it reports that "a review of the procedures used by this Court in the past for determining probable cause provides little, if any, guidance", in that they only "tacitly applied" the federal test to state law. Slip Opinion, at 6. Second, resorting to "legislative pronouncements", it finds essentially that legislative action taken after Aguilar v. Texas, 378 US 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), does not mean what Judges W.A. Morrison and John F. Onion, Jr. wrote in their respective commentaries, because they did not specify "the two prongs of Aguilar" or otherwise indicate that such analysis was "intended to be incorporated within the statute". Slip Opinion, at 9. Hypercritical to an extreme, neither of these arguments is particularly persuasive.

There is guidance aplenty as to past "procedures" used first by the Supreme Court of Texas and this Court to determine nearly all aspects of the law, including probable cause, demonstrated in my concurring opinion in Brown v. State, supra, at 800-801: "if not delineated by their own precedents, out of necessity young Texas courts looked to the common law or took the law from any other respectable source". Just in that fashion did the Supreme Court of Texas introduce into state law a definition of probable cause. Ibid. See note 4, ante.

Certainly the scope of the Fourth Amendment and of Article I, §9 are federal and state versions of the same -- are similar, inasmuch as both would safeguard the security of the people against evidentiary searches absent "probable cause". That all constitutional provi-

sions require "probable cause", however, does not facially mandate particular guidelines for implementation. This Court was free to, and in fact did, formulate its own working definition of "probable cause" to be applied in context of Article I, §9, in order to determine whether evidence must be excluded under now Art. 38.23, V.A.C.C.P., as having been "obtained ... in violation of any provisions of the Constitution ... of the State of Texas", as opposed to the federal constitution. See Brown v. State, supra at 806. We are equally free now, if not duty-bound, to fashion according to "our own lights" a standard under Article I, §9 by which to determine when information that is hearsay as to a search warrant affiant will be deemed sufficiently reliable to support a finding of "probable cause". Unless we happen to agree that the stand-

ard adopted by the Supreme Court is the most efficacious also in guaranteeing rights vouchsafed by our state constitution, the Supreme Court does not demand and we need not parrot its opinions.

In Aguilar v. State, 172 Tex.Cr.R. 631, 362 S.W.2d 111 (1962), defendant challenged admission of fruits of a seizure pursuant to a search warrant, contending that the affidavit was not "a sufficient statement of probable cause to comply with the Constitution of the United States and of this State", Id. at 113. Writing for the Court on rehearing Judge Morrison expressed the notion "that if we have properly decided this case under our Constitution and statutes then it has been properly decided under the Constitution of the United States and the holding in Mapp v. Ohio, supra." Ibid. Of a form commonly used before 1965, the affidavit recited:

> that affiants "have reason to believe and do believe [that named party possesses narcotic drugs for purpose of unlawful sale in that on or about a given date];...Affiants have received reliable information from a credible person and do believe [that narcotics are there so possessed]. Ibid.

Because the Court had "often held" such an affidavit "constitutes a sufficient recitation of 'probable cause' [citing only Davis v. State, 165 Tex.Cr.R. 2, 302 S.W.2d 419 (1957)], the Court was unable to conclude that "our exclusionary statute and the affidavit deprive an accused of due process under the Federal Constitution." Id., at 114-115[11].

In Aguilar v. Texas, supra, straight from Giordenello v. United States, 357 US 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958), the Supreme Court formulated its "two-prong test", reversed the judgment of the Court and remanded the cause. On remand the Court

summarily reversed the judgment of conviction. Aguilar v. State, 382 S.W.2d 480 (Tex.Cr.App. 1964).[12]

The Aguilar experience taught Texas two major lessons: One, that what statutory provisions there were for authorizing issuance of an arrest or search warrant did not meet constitutional muster;[13] two, that views recently prevailing on the Court in expounding sufficiency of an affidavit to show "probable cause" within the meaning of Article I, §9, failed to produce even minimal federal protection. They will be discussed seriatim.

Before Aguilar the general statute dealing with a search warrant was former Article 304 (C.C.P. 1925); it is merely a definition, having little to do with sufficiency of an affidavit.[14] See Historical Note to Article 18.01, the first paragraph of

which is former article 304. It was retained in the 1965 revision, but in light of Aguilar the Legislature added the second paragraph: "No search warrant shall issue for any purpose in this State unless a sworn complaint therefor shall first be filed with the issuing magistrate setting forth sufficient facts to satisfy the magistrate that probable cause does in fact exist for its issuance." It too was revised in 1973.

Both commentaries to Article 18.01, supra, make clear the addition was made by the Legislature on account of recent decisions by the Supreme Court, and each states the new provision is to meet their requirements; Presiding Judge Onion points out that Aguilar "voided a Texas search warrant based merely on 'reliable information', and held that there must be sufficient facts presented

to satisfy the magistrate that probable cause does in fact exist for issuance of a search warrant"; he then states what is insufficient and again what the affidavit must show, identifying the other cases.

The majority blinks reality in dismissing those contemporaneous commentaries concerning new statutory dictates of Article 18.01(b), on the specious ground that they do not "mention the two prongs of Aguilar or make any statement to the effect that such analysis is intended to be incorporated in the statute." Slip Opinion, at 9. Surely the majority would not contend with a straight face that §§(b) was added to Article 18.01 for any other reason. The Special Committee for Revision of the Code of Criminal Procedure expressly identified consideration of Aguilar v. Texas among several recent decisions

of the Supreme Court "which have adversely affected the long accepted practices in our Texas Courts." Erisman, Introduction to 1965 Revision Texas Code of Criminal Procedure, 1 Vernon's Annotated Code of Criminal Procedure (Vernon 1977) xv, at xix-xx.[15] To understand its "two-pronged test", all any concerned reader has to do is consult Aguilar.[16]

Acknowledging, as it must, that to challenges under §9 the Court "tacitly" applied "the Aguilar-Spinelli test",[17] the majority nevertheless does not find "judicial preference" for a broader interpretation of §9 than the Fourth Amendment. But it is not a matter of "preference". When "tacitly" or otherwise the Court put §9 to "the Aguilar-Spinelli test" it certainly was incorporating into the meaning of probable cause in §9 those requirements im-

posed by Aguilar-Spinelli, thus making them a part of the constitutional law of search and seizure for this State. That the Supreme Court of the United States modified its own views as to a requisite showing of probable cause within the meaning of the Fourth Amendment will not serve to withdraw a meaning of probable cause attributed by this Court to Article I, §9 of the Constitution of Texas.

Opinions of a majority of the Court in Chapin v. State, supra, and its followings, required "that the grounds of belief, that is, the facts or circumstances or information upon the belief is founded, must be exhibited in the affidavit", id., at 1097, and that is readily susceptible to an Aguilar analysis. But apparently because our general statutes setting out requisites of a complaint or application for search warrant were not that specific, articles

310-312 C.C.P. (1925), the Court came to believe, as in Aguilar v. State, supra, a statement merely that an affiant "received reliable information from a credible person" sufficed. Id., at 113, Davis v. State, supra, at 420. In the event, it is certainly true that before Aguilar v. Texas, supra, neither Article I, §9 nor the statutes of the State had been construed by the Court to require a showing of probable cause such as particularized in Aguilar. But once Aguilar was made applicable to §9 by this Court and caused the addition of §§(b) to Article 18.01 by the Legislature, under our federalism the fact that a reconstituted Supreme Court changed a part of its collective mind as to minimal protections afforded countrywide by the Fourth Amendment will not ipso facto overrule decisions of this Court and repeal an enact-

ment of our Legislature. That the Supreme Court "no longer demands it" is utterly irrelevant. The Supreme Court may not demand a State undo that which the State has already validly done in exercise of its own constitutional power. The Tenth Amendment reserves that power to the State of Texas - to this Court and to the Legislature, respectively.[18]

Unless otherwise prohibited, this Court is, of course, always "free to follow the lead" of the Supreme Court, but not mindlessly, wildly abandoning years of jurisprudence and statutory law of this State, as the majority would have this Court do today.

The majority does not even take time to consider the soundness of Illinois v. Gates, nor did the Hennessy panel. Instead, the majority silently defers to much of the rhet-

oric in Gates. Yet bases for rejecting the two-prong test, both in precedent and in logic, have been thoroughly undermined by state court justices and noted commentators on Fourth Amendment jurisprudence. E.g., Commonwealth v. Upton, supra; State v. Jackson, 688 F.2d 136, 141-43 (Wash. 1984); LaFave, Search And Seizure: A Treatise on the Fourth Amendment, §3.3(a) at 620-25; (2nd ed. 1987) Y. Kamisar, Gates, "Probable Cause," "Good Faith", and Beyond, 69 Iowa Law Review 551, 571-77, 583-84 (1984).

The question here, as in Gates, is whether hearsay information may be credited. Once that information is deemed creditable, then we should apply "a common sense, non-technical analysis" to decide whether it adds up to probable cause. As Justice

Brennan observed in his dissenting opinion:

> "Neither the [Aguilar/Spinelli] standards nor their effects are inconsistent with a 'practical, non-technical' conception of probable cause. Once a magistrate has determined that he has information before him that he can reasonably say has been obtained in a reliable way by a creditable person, he has ample room to use his common sense and to apply a practical, non-technical conception of probable cause."

US at 287, S.Ct. at 2358, L.Ed.2d at 580. In short, the "two-prong" test derived from Aguilar and Spinelli was never an impediment to practical, common sense evaluation of information for its tendency to establish probable cause. Rather, it was a guide to the threshold inquiry of whether information that is hearsay as to the warrant affiant should be considered sufficiently reliable in the first place even to be measured for its probable cause value.

Because the majority in Gates failed to recognize this distinction, it was able to conclude that the two prongs of the Aguilar/Spinelli test "are better understood as relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable cause determinations[.]" US at 233, S.Ct. at 2329, L.Ed.2d at 545. Accordingly, it was concluded that a deficiency in the "basis of knowledge" prong might be compensated for by an ample showing of "veracity", and vice versa. However, as Professor LaFave has pointed out, even:

> "[t]he preferred method of satisfying the basis of knowledge requirement, a direct statement from the informant himself as to how he came by the information, is virtually worthless when it comes from an individual from the criminal milieu about whom no veracity judgment is possible. And information tendered by a person of unquestioned credibility is worth very little when no judgment is possible

> as to the basis of his conclusions -- whether or not, to use the Court's oft-quoted language, he is merely reporting 'an offhand remark heard at a neighborhood bar.'"

LaFave, supra, at 622-23. In fact, as Justice White pointed out in his concurring opinion in Gates, information even from a proven informant which provides little or no indication of the source of his knowledge would be tantamount to a conclusory affidavit from a peace officer simply stating "that he has cause to suspect and does believe" his information to be true -- patently insufficient data, under Nathanson v. United States, 290 US 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933), to support a magistrate's independent conclusion that probable cause inheres. See also Stanley v. State, 19 Md.App. 507, 313 A.2d 847 at 861 (1974). Yet the majority in Gates ratified the holding of Nathanson.

I would adhere to the "two-pronged test" of Aguilar/Spinelli for purposes of Article I, §9 of our Constitution because of its utility in guiding all concerned to a complete assessment of informant creditability. Such a guide is useful both to the police, who must prepare affidavits on the basis of hearsay, and to magistrates who must evaluate them in order independently to determine whether the hearsay declarant's story is trustworthy. Trustworthiness is a function, not only of the honesty or reliability of the informant, but of the source in fact for his information. I agree with the observation that "[p]olice, magistrates and trial courts confront the question of probable cause every hour of every day, often with little time to reflect. They are best served by rules that mark off the forbidden territory as conspicuously as pos-

sible." Wald, The Unreasonable Reasonableness Test for Fourth Amendment Searches, 4 Crim.J.Ethics 2, 88 (Spring 1985). The Aguilar/Spinelli test is just such a rule.

The Legislature incorporated Aguilar into its search and seizure law in 1965. The Court has followed Aguilar/Spinelli for more than twenty years. The test is consistent with early decisions of the Court and intent of Framers of the Fifth Declaration. We preserve the sovereignty of this State and maintain the integrity of this Court by adhering to precedent that has served well our criminal justice system.

The notion that this Court must "stay in step" with the Supreme Court of the United States is the antithesis of our sworn duty to preserve, protect and defend the Constitution and laws of the State of Texas. To such a gratuitous

abdication of authority and responsibility of this Court, I dissent.

CLINTON, Judge

DELIVERED: March 23, 1988

En Banc

Publish

---

1 All emphasis is mine throughout unless otherwise noted.

---

2 The Constitution, the laws of the United States and all treaties made under authority of the United States are "the supreme Law of the Land; and the Judges in every State shall be bound by them, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Article VI, 2d para. Yet, that certain rights are identified in the Constitution "shall not be construed to deny or disparage others retained by the people," Ninth Amendment, and "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," Tenth Amendment. In ordaining and establishing the Constitution in the name of the People of the United States, the genius of the Framers was in maintaining sovereignty of the government of the United States of America while preserving integrity of each constituent State. See Fry v. United States, 421 U.S. 542, 547, n. 7, 95 S.Ct. 1792, 44 L.Ed.2d 363 (1975).

That "constitutional policy" has come to be called "federalism". In its criminal law aspect States may not abridge federal constitutional rights, guarantees and protections, but they are free to enlarge them. Oregon v. Hass, 420 US 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed. 559 (1980); Michigan v. Mosely, 423 US 96, 120-121, 96 S.Ct. 321, 334, 46 L.Ed.2d 313 (1975) (Brennan, J., dissenting). Thus, as the President of Texas Young Lawyers Association has incisively discerned, "It takes both the United States Constitution and the 50 state constitutions to determine the extent to which the federal system protects individual rights." Raney, "The Federal System, Part One: A Salute to the Texas Bill of Rights", Vol. 50 No. 3 Texas Bar Journal (March 1987) 309 (emphasis in original).

Texan Forefathers inserted toward the end of their first constitution a "Declaration of Rights", and declared it to be "a part of this Constitution, and shall never be violated." The last Bill of Rights adopted in 1876 declared that everything therein "is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto...shall be void." Article I, §29.

If for no other reason that the people of The Republic of Texas and then of The State of Texas so dearly valued their rights that they insisted upon protection

against intrusion by authorities of the very government they had established and were maintaining, members of the Judicial Department are constitutionally bound by their oath to "preserve, protect and defend" those rights, guarantees and protections. Article XVI, §1.

While there are many other reasons, a few will suffice. Since citizens of Texas have more contact with state law, their own Bill of Rights should be "closely scrutinized" by their courts. Raney, op cit., supra, at 310. And a state constitutional claim should be considered ahead of a federal claim because, Dean W. Frank Newton points out in an unpublished paper presented to Appellate Judges Session, Texas Judicial Conference, September 25, 1986, if the issue may be disposed of on that basis there is no need to reach the federal question, unnecessary appellate review problems are avoided and, most importantly, state sovereignty is preserved. Moreover, Dean Newton concludes, "This 'states first' approach grants double protection to Texans, as contemplated by our two-constitution federal system."

Finally, as Oregon Supreme Court Justice Hans A. Linde has commented, emphasizing use of states' bills of rights "will lead all of us to face closer to home some fundamental values that the public has become accustomed to have decided for them by faraway oracles in the marble temple." Linde, "First Things First: Redis-

covering the States' Bills of Rights". 9 U. Baltimore L.Rev. 379 (1980), quoted approvingly by Raney, op.cit., supra, at 310.

---

3 The rich history of compelling events has been retold many times: e.g., Boyd v. United States, 116 US 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886); Weeks v. United States, 232 US 883, 34 S.Ct. 341, 58 L.Ed. 652 (1914); Harris v. United States, supra, at 157-159, S.Ct., at 1104-1105.

---

4 Therefore, Justice Frankfurter found it entirely appropriate to "look to the construction which the early Massachusetts Court placed on the progenitor of the Fourth Amendment." Id., at 161, S.Ct. at 1106. Early on Texas Courts did just that. See, e.g., Dupree v. State, 102 Tex. 455, 119 S.W. 301, at 303, 306, 307 (1909), citing and discussing Fisher v. McGirr, 67 Mass (1 Gray) 1, and Commonwealth v. Certain Lottery Tickets, 5 Cush. (Mass.) 369.

---

5 Although adoption of the Fourteenth Amendment was proclaimed in 1868, not until Gitlow v. New York, 268 US 652, 666, 45 S.Ct. 625, 630, 69 L.Ed. 1138 (1925), did the Supreme Court suggest states may be bound through its Due Process

Clause by rights and liberties guaranteed in the Bill of Rights. See also Palko v. Connecticut, 302 US 319, at 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937). In Wolf v. People of the State of Colorado, 338 US 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), the Supreme Court held security of privacy against arbitrary intrusion by police is enforceable against the States through the Due Process Clause. The federal exclusionary rule under the Fourth Amendment was not applied to the states until Mapp v. Ohio, 367 US 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

---

6 In the latter, the Provisional Judiciary was granted jurisdiction over "all crimes and misdemeanors recognized and known to the common law of England"; judges were empowered to grant writs of arrest "established by the 'Civil Code' and 'Code of Practice' of the State of Louisiana, to be regulated in the forms thereof", Article VI, and "in criminal cases the proceedings shall be regulated and conducted upon the principles of the common law of England", Article VII.

---

7 At least three are relevant here, viz.:

"It incarcerated in a dungeon, for a long time, one of our citizens, for no other cause but a zealous endeavor to procure the accept-

ance of our Constitution, and the establishment of a state government."

"It has suffered the military commandants, stationed among us, to exercise arbitrary acts of oppression and tyranny, thus trampling upon the most sacred rights of the citizen[.]"

"It has demanded the surrender of a number of our citizens, and ordered military detachments to seize and carry them into the interior for trial[.]"

Accordingly, the people of Texas constituted "A FREE, SOVEREIGN, AND INDEPENDENT REPUBLIC", "fully invested with all the rights and attributes which properly belong to independent nations[.]" Declaration of Independence, 3 Vernon's Texas Constitution (Vernon 1955) 521-522.

---

8 An Act of January 20, 1840, made the common law of England, so far as not inconsistent with the Constitution and Acts of Congress then in force, the rule of decision; it also repealed all laws in force prior to September 1, 1836 -- "except the laws of the Consultation and Provisional Government[.]" Introduction, supra, at 507.

---

9 Justice Frankfurter added that a decision may turn on "whether one

gives that Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime." Ibid.

---

10 The people of Texas never voluntarily relinquished the right to claim protections granted by the original Fifth Declaration. The Constitution of 1845 was drawn on a new constitution of Louisiana and the proposed constitution of 1833, but the general plan of government and the bill of rights seem to be patterned on the Constitution of the Republic. Interpretive Commentary, supra, at 199. Then came the "late unpleasantness" and Reconstruction, during which government was equally hostile and oppressive. To guard against continuation or repetition of those evils, delegates met again to form another constitution. Using the former 1845 constitution "as a working model", drafters of the present Constitution included ideas taken from, e.g., constitutions of Louisiana and Pennsylvania. Id., at 201; Comment, supra, at 497, n. 38 and accompanying text. Through it all substance of the Fifth Declaration remained intact as a statement of right to security against unreasonable searches and seizures, as well as prohibitions against state and local government.

---

11 Davis v. State, supra, does not indicate whether it held the

affidavit sufficient under Fourth Amendment or §9, but cites an important decision by the Court -- Chapin v. State, 107 Tex.Cr.R. 477, 296 SW 1095 (1927), which shows again the "methodology" utilized by the Court early on. See Brown v. State, supra, at 801, 806. It also involved the search of a private dwelling, this time under a particular statute requiring that affidavits of two persons "show that such residence is a place where intoxicating liquor is sold [et cetera]." The affidavits recited only that "affiants have reason to believe, and do believe, [et cetera]." The contention was that fruits of a search were obtained in violation of both Article I, §9 and the Fourth Amendment in that warrant was issued "without probable cause, supported by oath or affirmation". Id., SW at 1096-1097.

Writing the lead opinion, Presiding Judge Morrow pointed out that to authorize search of a private dwelling for contraband a warrant must be issued in accord with probable cause requirement of Article I, §9, and noted that "[b]efore our Constitution [of 1876] was adopted," the Supreme Court of Texas had defined probable cause in Landa v. Obert, 45 Tex. 539 (1875). See Brown v. State, supra, at 801. Reviewing works of learned scholars and decisions of state and federal courts, including the Supreme Court of the United States, Presiding Judge Morrow found many precedents declaring

invalid a search warrant issued upon an affidavit that "affiants had reason to believe and did believe", and that the great weight of authority is "that the grounds for belief, that is, the facts and circumstances or information upon which the belief is founded, must be exhibited in the affidavit." Id., at 1097. The question of validity of the warrant and supporting affidavits "must be determined by the construction of [the statute], in connection with Article I, §9, Bill of Rights, and the previous interpretation of the term 'probable cause' as used in the Bill of Rights." Id., at 1098-1099.

First he found that the terms of the statute indicated "a legislative intent to adhere to the interpretation of the constitutional requirement of 'probable cause' that the affidavit state the facts and circumstances upon which the belief is founded", because it required the affidavit to "show" that the residence was a place where the law was violated, and "show" means "to make clear or apparent; to prove. [Citations omitted.]" Id., at 1029.

Turning then to the Texas exclusionary rule in former Article 727a (now Article 39.23, V.A.C.C.P.), Presiding Judge Morrow, having examined other authorities from like sources, pointed out:

> "Belief on undisclosed information does not show 'probable

> cause' for search, as that term is used in the state and federal constitutions. Such is the expressed view of the United States courts and of nearly all the state courts... The definition of 'probable cause' announced by the Supreme Court of this state before the present Constitution was adopted is like that in the federal courts, and, the state courts holding the belief insufficient, and in adopting the Constitution, the definition was approved."

Id., at 1099.

Comparing the statute involved in an earlier decision of the Supreme Court in Dupree v. State, 12 Tex. 455, 119 SW 301 (1909), Presiding Judge Morrow believed the Legislature did not intend to give a meaning to the term 'probable cause' different from that "prevailing in the Supreme Court of the United States, announced in the statutes of the United States, and adopted by practically all of the states of the Union", and did not intend to provide that a warrant to search a private dwelling might issue upon an affidavit giving "no fact, circumstance, or detailed information showing, or tending to show, that the dwelling was used for the purpose denounced by the statutes which conveyed to the magistrate... no information from which to determine whether the facts justified

issuance of the warrant." Id., at 1100.

Accordingly, he concluded:

> "If the affiants seeking a search warrant have reason to believe that a private dwelling is used for the storage of liquor, no sound reason is perceived for failing to disclose the grounds of belief in the affidavit presented to the magistrate...The rule is intended to 'give a guaranty to the citizen against searches and seizures dependent upon such uncertainties by interposing between him and the rash or unscrupulous accusers the judgment of the magistrate chosen by the state.'"

"Because the incriminating evidence was obtained through a search upon a warrant without legal authority, it was improperly received over the objections of the appellant." Judgment was reversed and the cause remanded. Ibid.

Judge Hawkins concurred with an opinion in much the same vein. At one point he reasoned that an affidavit which simply states affiant "believes and has good reason to believe" that probable cause exists "seeks to substitute the opinion of the affiant for the judgment of the magistrate who in such case is called upon to act judicially without any knowledge of the facts upon which the affiant predicated his belief." Id., at 1101.

He discovered "nothing in our present statutes which indicates any purpose of the Legislature to attempt a departure from the well-established holding of the United States Courts and those of a majority of the other states to the effect that an affidavit for a search warrant which furnishes no facts or information to the issuing magistrate...does not comply with the provisions of our own and the federal Constitution requiring 'probable cause' to be shown. Id., at 1102.

Judge Lattimore dissented, expressing his adherence to language of statutes then extant, and refusal "to follow federal courts in their procedure or rulings." Id., at 1102-1108.

The opinions of the Court in Chapin, supra, note 12, preceded by thirty years the opinion of the Supreme Court of the United States in Giordenello v. United States, 357 US 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958), and its holding that mere conclusions in an affidavit are not sufficient.

---

12 The holding of Giordenello that mere conclusions are insufficient presaged all contemporaneous decisions in similar search warrant litigation, viz.: Etchieson v. State, 372 S.W.2d 690 (Tex.Cr. App. 1963), judgment vacated and cause remanded, 378 US 589, 4 S.Ct. 1932, 12 L.Ed. 1041 (1964), on remand, 382 S.W.2d 478 (Tex.Cr.App.

1964); see also arrest warrant litigation in Barnes v. State, 390 S.W.2d 266, (Tex.Cr.App. 1964), reversed and remanded, Barnes v. Texas, 380 US 253, 85 S.Ct. 942, 13 L.Ed.2d 818 (1965), on remand, 390 S.W.2d 270 (Tex.Cr.App. 1965).

---

13 Prior to 1965, the statutory provision for a "complaint" sufficient to authorize a magistrate to issue an arrest warrant was Article 222, now Article 15.05 V.A.C.C.P. That both are constitutionally inadequate to the task is demonstrated by Barnes v. Texas, 380 US 253, 85 S.Ct. 942, 13 L.Ed.2d 818 (1965), summarily reversing judgment in Barnes v. State, 390 S.W.2d 266 (Tex.Cr.App. 1964), in light of Giordenello v. United States, supra, and Aguilar v. Texas, supra. Presumably the reversal came too late to raise prescriptions in Article 15.05, supra, to minimal federal constitutional requirements, but both the late Judge Morrison in his Interpretive Commentary and Presiding Judge Onion in his Special Commentary following Article 15.05 indicate that the Barnes opinion of the Supreme Court supersedes the statute.

---

14 The 1925 code of criminal procedure, as in all codes since the Old Code, provided authority to issue search warrants for limited

specific purposes, e.g., "property acquired by theft", etc. See former Article 305, reproduced in Historical Note following Article 18.02, V.A.C.C.P. Concomitantly, statutory requisites for a "written sworn complaint" before a magistrate were likewise related to the particular purpose. See former Articles 310, 311 and 312, C.C.P. 1925, carried forward substantially into the 1965 C.C.P. See Historical Notes to Articles 18.07, 18.08 and 18.09, respectively. They were all deleted by substitution of conforming amendments to the Penal Code, by Acts 1973, 63rd Leg., ch. 399, p. 982, §2(E), leaving only Article 18.01(b) to prescribe requisites.

---

15 After citing the Aguilar litigation, Judge Erisman wrote:

> "The filing of sufficient facts to satisfy the Magistrate that probable cause does in fact exist for the issuance of a search warrant, is a requirement of Articles 18.01, 18.08 and 18.09, supplementing CCP 304, 311, 312."

(Emphasis supplied by Judge Erisman.)

---

16 Almost twenty years after Aguilar was decided and §§(b) had been added to Article 18.01, Illinois v. Gates was is-

sued, and a Court Panel composed of two judges delivered an opinion in Hennessy v. State, 660 S.W.2d 87 (Tex.Cr.App. 1983). The majority says Hennessy presented an "opportunity to interpret Article 18.01(b), supra, in light of Aguilar." However, except for indicating Article 18.01(b) was cited to support her contention, the two-judge opinion never again so much as alluded to it. In short, they failed to seize the opportunity. To find now "the reasoning of Hennessy sound" vis-a-vis the statute when there is none is to make the wish father to the thought. Moreover, to apply "Gates' standards and principles" retroactively twenty years to a state statute defies every reasonable canon of statutory construction.

---

17 Spinelli v. United States, 393 US 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969): Affidavit must not only state conclusion of affiant and informer but must also include facts from which magistrate can find conclusions are warranted; facts must allow magistrate to conclude his information is reliable and informer is credible.

---

18 Recently, among other states, Massachusetts illuminatingly proved the point in the Upton case. Commonwealth v. Upton, 390 Mass. 562, 458 N.E.2d 717 (1983);

reversed and remanded, Massachusetts v. Upton, 466 US 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1985); on remand, Commonwealth v. Upton, 394 Mass. 363, 476 N.E.2d 548 (1985).

Notwithstanding Illinois v. Gates, the Supreme Judicial Court of Massachusetts continued to rely on Aguilar-Spinelli in applying the probable cause requirement of the Fourth Amendment. The Supreme Court of the United States said the Supreme Judicial Court "misunderstood our decision in Gates", and thereby fell into error. Massachusetts v. Upton, supra, at 732, S.Ct. at 2087-2088. In his separate concurring opinion, Justice Stevens took the Supreme Judicial Court to task.

> "In my opinion the Supreme Judicial Court of Massachusetts reflects an error of a more fundamental character than the one this Court corrects today. It rested its decision on the Fourth Amendment without telling us whether the warrant was valid as a matter of Massachusetts law. [Notes omitted throughout.] It has thereby increased its burdens as well as ours. For when the case returns to that Court, it must then review the probable-cause issue once again and decide whether or not a violation of the state constitutional protection against unreasonable searches and seizures has occurred. If

> such a violation did take place, much of that Court's first opinion and all of this Court's opinion are for naught."

Id., at 735, S.Ct. at 2089.

On remand the Supreme Judicial Court heeded that admonition, and in effect rendered its first opinion and that of the Supreme Court "for naught". For its own reasons and others given by commentators and courts, it rejected "totality circumstance test" as a standard for determining probable cause under Article XIV of its own Declaration of Rights. Commonwealth v. Upton, supra, N.E.2d at 556, and n. 10. Instead, it adopted "stricter" Aguilar-Spinelli tests as the state standard for several reasons including that it provides more substantive protection than does the Fourth Amendment according to Gates. Id., at 556-558.

In Commonwealth v. Bottari, 395 Mass. 777, 482 N.E.2d 321 (1985), the Supreme Judicial Court applied Aguilar-Spinelli to a warrantless arrest. Id., at 325.

LEE WARREN EISENHAUER, Appellant, NO. 149-85 VS THE STATE OF TEXAS, Appellee.	Petition for Discretionary Review from the Court of Appeals, First Supreme Judicial District of Texas (HARRIS County)

DISSENTING OPINION

I join the dissenting opinion filed by Judge Clinton in this cause. However, given what the majority opinion that is authored by Judge McCormick states and holds, I am strongly compelled to also file this dissenting opinion.

I find that Hon. Alfred Walker, First Assistant State's Attorney, in the petition for discretionary review that he has filed in this cause on behalf of the State, has succinctly, and perhaps correctly, formulated the issue that is before this Court for resolution when he states: "The basic question in this

case is whether [, given what the Legislature of Texas enacted after the Supreme Court of the United States decided Aguilar v. Texas, 378 US 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), which, for Federal Fourth Amendment Constitutional purposes, adopted a two-prong test in making the determination whether an affidavit for a search warrant should issue], the rules and principles of Illinois v. Gates, [462 US 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), which abandoned the two-prong Aguilar test], should be followed in Texas in preference to the older rule and principles of Aguilar and Spinelli [v. U.S., 393 US 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969)]." (Page 3, State's Petition for Discretionary Review.) Given the fact that what the Supreme Court stated and held in Illinois v. Gates, supra, in lessen-

ing the State's burden in search warrant cases, if adopted, will make it extremely easy for the State to now obtain a search warrant, or to make a warrantless arrest, it is understandable why Walker advocates that this Court should adhere to what the Supreme Court stated and held in Illinois v. Gates, supra.

The real issue, however, that is before this Court is whether this Court should exist merely to mimic and parrot the decisions of the Supreme Court of the United States Supreme Court (sic), or should exist as an independent member of the Judicial Branch of our State Government. To appreciate the present internal struggle that presently exists, over what standard should be adopted,[1] it is first necessary for the reader to go and read what was stated and held by this Court in its opinion of Aguilar v. State, 362 S.W.2d 111

(Tex.Cr.App. 1962); go and read what the Supreme Court of the United States thereafter stated and held in its decision of Aguilar v. Texas, supra, which was a review of this Court's decision of Aguilar v. State, supra; what the Legislature of this State enacted after Aguilar v. Texas, supra, became the federal law of the land; and what some of the spokespersons of this State in the field of criminal law, such as now Presiding Judge Onion, former Presiding Judge Morrison, former District Judge Erisman, and a host of other spokespersons, some still alive, thereafter wrote about what the Supreme Court had held in Aguilar v. Texas, supra, and Spinelli v. United States, supra. I find that only then can one appreciate and understand why I am so concerned about what and why the majori-

ty adopts to be the law of this State on this subject.

Given what this Court has unequivocally stated for over the past 20 years, in subscribing to the two-pronged "Aguilar/Spinelli" test, before that test is replaced by an experimental amorphous test, the majority opinion by Judge McCormick should at least direct our attention to articles written by leading spokespersons of the criminal law of this State which give justifiable reasons why the two-pronged "Aguilar/Spinelli" test, which has now been timetested, which members of the law enforcement establishment have certainly more than adequately learned to cope with, to the point where some police agencies have in the past prepared and used preprinted "fill-in-the-blank" type forms, see Brown v. State, 437 S.W.2d 828 (Tex.Cr.App. 1968), should no longer be

"the test", and not just inform the reader what he and those members of this Court who join his opinion might personally prefer.

In Aguilar v. State, supra, the defendant in that cause objected in the trial court to the admission of evidence that was obtained pursuant to the execution of a search warrant, on the ground that the affidavit for the search warrant was "based on hearsay, did not set forth a statement of the offense in clear, plain and intelligible language, and was insufficient to authorize the issuance of the search warrant." (112.) His objection was overruled. In an opinion by one of its then-Commissioners, which opinion was approved by the Court, the trial court's decision was affirmed, the opinion holding the following: "An examination of the affidavit [which merely stated that the basis for obtaining

the search warrant was the following: 'that on or about the 8 day of January, A.D. 1960, Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises of the purpose of sale and use contrary to the provisions of the law'] shows that it recites sufficient facts and information to constitute probable cause for the issuance of the warrant." (112.) On rehearing, in an opinion by Judge Morrison, this Court stated that the defendant questioned the soundness of the original opinion. The opinion on rehearing states that the defendant had contended on appeal that the affidavit for the search warrant, as a matter of Federal and State Constitutional law, was deficient because it did not set out a suffi-

cient statement of probable cause. This Court rejected that contention, holding that in the past this Court "has often held that an affidavit identical to the one above constitutes a sufficient recitation of 'probable cause'. Davis v. State, 165 Tex.Cr.R. 2, 302 S.W.2d 419 (1957)." It further stated: "We are aware of no decision of the Supreme Court holding that such an affidavit is insufficient.. We are unable to bring ourselves to the conclusion that our exclusionary statute [now Art. 38.23, V.A.C.C.P.] and the affidavit before us here deprives an accused of due process under the Federal Constitution." (113-114.)

The two-pronged Aguilar/Spinelli test, as reflected by the many decisions of this and other courts that rejected claims that an affidavit was deficient, and lack of any real criticism by law

enforcement authorities, is actually a quite simple test to pass. In order for a search warrant to issue under the test, "The magistrate must simply (1) be informed of the underlying circumstances from which it can be determined that the affiant received his information in a 'reliable' way and the magistrate must also (2) simply be informed of specific factual allegations from which the affiant concluded that the source was 'credible' or his information 'reliable'. Absent such factual allegations, there is not sufficient basis for a neutral magistrate to make an initial determination that probable cause exists." Winkles v. State, 634 S.W.2d 289, 291 (Tex.Cr.App. 1982) (On original submission).

For over twenty years, this Court religiously subscribed to what the Supreme Court had stated and held in

Aguilar v. Texas, supra, and Spinelli v. United States, supra, which merely refined Aguilar v. Texas, supra.

In Marquez v. State, 725 S.W.2d 217, 233 (Tex.Cr.App. 1987), in his almost unanimous opinion for the Court, which Judge McCormick himself joined without any reservations or qualifications whatsoever, Judge W.C. Davis, the author of that opinion, correctly pointed out the following: "Since this State has always used the stricter Aguilar/Spinelli test for analyzing probable cause under Article I, Section 9 of the Texas Constitution we will review the instant affidavit using this approach." Judge McCormick, however, implicitly states in footnote 4 in his opinion, without acknowledging that most of what he states in his opinion is without authority and should be considered dicta,

has the audacity to state that that holding "was unsupported by authority and is to be considered dicta." As easily seen, however, Judge Davis, in making the above statement, was merely recognizing on behalf of this Court what all but a few persons, which apparently did not then exclude Judge McCormick, were then fully aware of, that the "two-pronged Aguilar/Spinelli test" had become written in stone as far as this Court was concerned.

History, but not Judge McCormick's opinion, teaches us that soon after Aguilar v. Texas, supra, was decided by the Supreme Court of the United States, the 59th Legislature of this State enacted a new Code of Criminal Procedure, which final product was primarily the effort of the State Bar of Texas' Special Committee for the Revision of the Code of Criminal Procedure.

The Committee and the Legislature, obviously then aware of Aguilar v. Texas, supra, incorporated it into the Code of Criminal Procedure, which became effective January 1, 1966. Judge Fred Erisman, the chairman of the State Bar of Texas - Special Committee for the Revision of the Code of Criminal Procedure (Nov. 11, 1958-June 18, 1965), clearly pointed this out in his "Introduction to 1965 Revision Texas Code of Criminal Procedure". Former Presiding Judge, then Judge Morrison, in his "Interpretive Commentary", further pointed this out when he stated the following: "The Committee merely incorporated the effect of ['the holdings by the Supreme Court which had invalidated two convictions from Texas because the affidavits for the search warrants did not contain sufficient facts to satisfy the magistrate that probable cause did in fact exist

for the issuance of the warrant'][2] into the code so that such requirements would be made known and available to the local magistrates." Presiding Judge Onion, in his "Special Commentary", after expressly discussing Aguilar v. Texas, supra, stated the following: "The new Code has been reworded to meet these requirements." Presiding Judge Onion then gave suggestions as to how these requirements might be satisfied. Judge McCormick, implicitly if not expressly, states on page 9 of his slip opinion that because neither Judge Morrison nor Presiding Judge Onion quoted Aguilar v. Texas, supra, in its entirety, that this omission should permit the reader to conclude or infer that what they expressly stated in print was not what they actually meant to state in print. Judge McCormick states: "Nowhere do Judge Morrison or Judge Onion

mention the two prongs of Aguilar or make any statement to the effect that such analysis was intended to be incorporated in the statute." I suppose this means that is one actually sees a rattler bite into his body, but fails to tell anyone that a rattler in fact bit him, that he was not really bitten by the rattler, notwithstanding that he almost died from the rattler's bite. Of course, if one takes the approach that Judge McCormick does, then anything that was printed in the intervening 20-some odd years since Aguilar v. Texas, supra, was decided, was really not printed; such represents a mere illusion in the eyes of the reader, and should be ignored.

If that is the case, I suppose that we must disregard the law review article that then-briefing attorney, now Judge, McCormick wrote in 3 St. Mary's Law Re-

view (1971), entitled "Search Warrants: The Requisites of Validity", in which he made the following suggestions in obtaining a search warrant: "2. Determine whether, from reading the affidavit itself, an informant was involved. If an informant was involved, then apply the rules announced in Aguilar and Spinelli. 3. If no informant was involved, then determine the sufficiency of the evidence in light of Giordenello and Nathanson [see my discussion of Aguilar v. Texas, ante.]." (64).

I also suppose the same is applicable to the article wrriten by Paul J. McClung in 28 Texas Bar Journal (1965) entitled "Recent Developments in Search and Seizure"; the article written by Clyde W. Woody and Marian S. Rosen in 11 South Texas Law Journal (1969-1970), entitled "Fourth Amendment, Viewed and Reviewed"; the article written by Saul

W. Bernstein in 21 Southwestern Law Journal (1967) entitled "Criminal Law and Procedure"; the article written by Carol S. Vance in 10 South Texas Law Journal (1967-1968), entitled "The 1967 Amendments to the Texas Code of Criminal Procedure: A Prosecutor's Reflections"; and, of course, the article written by Presiding Judge Onion and his then-briefing attorney Warren E. "Whizzer" White, that appeared in 10 South Texas Law Journal (1967-1968), entitled "Texas Code of Criminal Procedure-Its 1965 and 1967 Changes Affecting Corporation Courts and Police Practices", in which the following was stated: "As a direct result of Aguilar, a number of important changes were made in the 1965 Code of Criminal Procedure. Article 18.01 (1965), which defines a search warrant, added a new paragraph [now Article 18.01(b)]...In order for the 'underlying

circumstances' presented to the magistrate to be sufficient to support probable cause, they must be based on either (1) the personal observations of the officer making the affidavit, or (2) the personal observations of a proven reliable informant, or (3) the personal observations of an informer whose reliability is unproven, plus corroborating observations made by the officer making the affidavit (i.e., underlying circumstances from which the officer concluded that the informant was credible and his information reliable)." (107.)

In attempting to resolve the issue, I personally have found each of the above articles extremely helpful, and do not view them as either an illusion or something that can be ignored.

In 1983, in Illinois v. Gates, supra, the Supreme Court decided to abandon the "Aguilar/Spinelli two-pronged

test" in favor of an amorphous "totality of the circumstances" approach, under which nebulous and amorphous standard the issuing magistrate is now to make only a "practical, common-sense decision whether there is a fair probability" that the evidence sought will be found in the place to be searched. Thus, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, supra, 103 S.Ct. at 2332. This is the test that Judge McCormick, and those who join his opinion, vote for, which replaces the time-honored and time-tested two-pronged test

that Aguilar/Spinelli gave us, which this Court and law enforcement personnel have for over 20 years religiously subscribed to.

Thus, under Gates, supra, the rule today, for federal constitutional law purposes, whether probable cause to arrest or to obtain a warrant, which is based upon hearsay information, is found to exist is made by considering the totality of the circumstances set forth to arrive at a practical, common-sense decision as to whether there is a fair probability that contraband or evidence will be found in a particular place. This, unquestionably, is a lesser standard of proof than that stated in the two-pronged Aguilar/Spinelli test, and, because the States have the right to adopt a more liberal standard than the Supreme Court has adopted for federal constitutional law purposes, the main

issue to be decided by this Court is whether it will continue to subscribe to the two-pronged Aguilar/Spinelli test or will opt for the above amorphous "Gates test".

Judge McCormick states on page 9 of his opinion that "This Court had the opportunity to interpret Article 18.01(b), supra, in light of Aguilar in Hennessy v. State, 660 S.W.2d 87 (Tex.Cr.App. 1983)." (My emphasis.) However, if one will take the time to peruse Hennessy, supra, he will easily see that Judge McCormick's statement, if it means or implies that the opinion was an En Banc opinion, is totally erroneous because that opinion was only a two-judge panel opinion and was not an En Banc opinion of this Court.

Why is the rule now extant as a result of Gates, supra, so terribly

wrong? Well, in the first place, it throws predictability and precision in judicial review of search and seizure cases, both warrantless and with warrant, to the winds, and fails to give law enforcement personnel any "bright line" guidance in performing their duties. E.g., People v. Johnson, supra. Thirdly, and just as important, a sought-after change of our public policy to adopt the amorphous standard of Gates, supra, has not surfaced. To the contrary, though the Legislature has met in both regular and special sessions several times since Gates, supra, was decided, at no time has it enacted any legislation that might expressly repeal what it enacted after Aguilar v. Texas, supra, was decided, namely Art. 18.01(b), supra, which provision was not part of former Art. 304, 1925 Code of Criminal Proced-

ure, the predecessor to Art. 18.01, supra, but was placed within Article 18.01, supra, solely as a result of Aguilar v. Texas, supra, being decided. As previously mentioned, Presiding Judge Onion and his then-briefing attorney White many, many years ago wrote the following: "Article 18.01 (1965), which defines a search warrant, added a new paragraph which provides as follows: 'No search warrant shall issue for any purpose in this State unless a sworn complaint therefor shall first be filed with the issuing magistrate setting forth sufficient facts to satisfy the magistrate that probable cause does in fact exist for the issuance.'" Also see then-briefing attorney, but now Judge, McCormick's article, supra. Thus, the statutory provision of Article 18.01(b), supra, although expressly enacted as part of a comprehensive codifica-

tion of search warrant practice and procedure, was actually a codification and expansion of the rule enunciated in Aguilar/Spinelli, supra.

Because the two-pronged Aguilar/Spinelli test has been written into our statutory law, albeit such only implicitly applies to warrantless arrests and searches, the issue here is whether the hearsay information that the arresting officer had when he arrested appellant was sufficient under the statute to establish probable cause, e.g., People v. Sherbine, supra.

In Eisenhauer III, supra, which is the case at bar, the court of appeals on remand first pointed out what was thought by many to be sacrosanct: "Under Texas law, an affidavit for a search warrant based upon hearsay must satisfy the two-prong test that the magistrate be informed of the underlying circumstan-

ces which render the information reliable and that he be informed of specific factual allegations which render the source of the information reliable. Tex.Crim.P. art. 18.01 (Vernon 1977); Winkles v. State, 634 S.W.2d 289 (Tex.Cr.App. 1982). Glass v. State, 681 S.W.2d 599 (Tex.Cr.App. 1984)." (785.) The court of appeals, in sustaining appellant's first and second grounds of error, which asserted "that appellant's arrest was without probable cause" and "there was insufficient evidence to establish the credibility of the informant", stated the following: "In the present matter, the officer testified that he had never received any information from the informant previous to the phone conversation of February 16, 1982. He had no idea whether the information was accurate when he acted upon it, and he testified that the

informant himself had never seen the cocaine the appellant was to obtain. According to the officer, all the informant knew was that 'a person was supposed to go to Miami and obtain some cocaine'. There was no testimony as to the credibility of the informant or even an affirmative showing that the officer had previously received information from the informant." (785.)

Judge McCormick's opinion denigrates this Court's opinion of Winkles, supra, because it "contains no mention of any independent state grounds of review". I find that it is only if one has slept for over the past 20 years, or has not had a chance to read this Court's many opinions on the subject that have been handed down during the past 20 years, can one actually make this statement. Judge McCormick says that the court of appeals' citation to

Glass, supra, "actually undermines the position of the Court of Appeals since Gates, and it, not Aguilar, is mentioned as an example of what is necessary to establish probable cause." (Page 7 of slip opinion.) I find that it is only in the instance where one has not yet read that part of Glass, supra, which mentions Illinois v. Gates, supra, which is only mentioned once in the entire opinion, can one make the statement that Judge McCormick makes. In discussing why an anonymous telephone call, standing alone, will never provide sufficient facts that would authorize a warrantless arrest or search, which is per se unreasonable, and that "Something more is required before probable cause to make a warrantless arrest or search is shown to exist", I, as the author of that opinion for the Court, did state the following:

"E.g., Illinois v. Gates, 462 US 213, 103 S.Ct. 2317, 76 L.Ed.2d 527, 541 (1983)." I did so only to point out and emphasize to the reader that an anonymous telephone call was much like the anonymous letter that existed in Illinois v. Gates, supra, which the Supreme Court itself expressly held would never be sufficient to establish probable cause. Thus, contrary to Judge McCormick's view, Illinois v. Gates, supra, was not cited as an example of what is necessary to establish probable cause, but was cited, in the context of using information obtained from an anonymous source, such as from an anonymous telephone call or an anonymous letter, what would not be sufficient to establish probable cause. The court of appeals thus correctly cited Glass, supra, as authority in support of its statement.

Given what I have stated, because of what the Legislature enacted after Aguilar v. Texas, supra, was decided, and the authoritative comments pertaining thereto, it is unnecessary to decide whether the Texas Constitution incorporates the concepts of the Aguilar/Spinelli test. E.g., People v. Sherbine, supra.

What really shocks me about Judge McCormick's opinion, in addition to what I have already stated, is the fact that he has long been the paradigmatic judge of this Court in dogmatically subscribing to the view that this Court should never be or act as a "Super Legislature", as seen by the dissenting opinions that he filed in Long v. State, ___ S.W.2d. ___ (Tex.Cr.App. No. 867-85, July 1, 1987), "This Court has the obligation not to act as a super-legislature, substituting our opinion

for that of the second branch of government. We have, instead, the responsibility to construe statutes in a constitutional manner where possible" (Citations omitted), and Jackson v. State, 718 S.W.2d 724, 728 (Tex.Cr.App. 1986), "The majority today puts on its legislative caps and overrules precedent and in contravention of specific legislative intent...". Today, however, it appears that Judge McCormick no longer subscribes to those views; otherwise it stands to reason, given what the Legislature has enacted in this area of the law, see Art. 18.01(b), supra, he would be writing a dissenting opinion to his own opinion.

Judge McCormick's opinion concludes that all his opinion is doing is keeping this Court "in [lock?] step with the federal constitutional model for probable cause determination." (Page 11 of

slip opinion.) However, if Gates, supra, and Judge McCormick's opinion are actually intended to be "role models for probable cause determination", then I find that the term "role model" should be stricken from our dictionaries and our vocabularies.

To the tortured route that Judge McCormick takes to reach the conclusion that "The judgment of the Court of Appeals is reversed and the judgment of the trial court affirmed", I respectfully dissent with all of the vigor at my command. Also see Washington Irving, The Sketch Book of Geoffrey Crayon, Gent. (London, 1920), which concerns the story of what happened to the character Rip Van Winkle after he slept for twenty years.

TEAGUE, Judge

EN BANC
DELIVERED: March 23, 1988
PUBLISH

---

1 The kind of struggle, that was caused by the Supreme Court decision of Illinois v. Gates, supra, that exists within this Court today, is not limited to just this Court. It is a struggle that exists among the appellate courts of our Nation, from the Atlantic to the Pacific. Recently, Latzer, an Associate Professor of Government at John Jay College of Criminal Justice, in his article entitled "Limits of the New Federalism" that appeared in the January, 1987 issue of Search and Seizure Law Report, made a study of, among other things, which States had accepted and which States had rejected the Supreme Court's decision of Illinois v. Gates, supra. Latzer's research reflects that those States of the Union whose high courts have maintained their judicial independence are the following: ALASKA: State v. Jones, 706 P.2d 317 (Alas. 1985); CONNECTICUT: State v. Kimbro, 496 A.2d 498 (Conn. 1985); MASSACHUSETTS: Commonwealth v. Upton, 476 N.E.2d 548 (Mass. 1985); NEW YORK: People v. Johnson, 488 N.E.2d 439 (N.Y. 1985), and WASHINGTON: State v. Jackson, 688 P.2d 136 (Wash. 1984). At least sixteen high State Courts have, unfortunately, opted, much like the aggressive and assertive majority of this Court opts, to also become nothing more than mim-

ics or court jesters for the Supreme Court of the United States. They are the following: ARIZONA: State v. Bolt, 689 P.2d. 519 (Ariz.Sup.Ct. 1984); COLORADO: People v. Pannebaker, 714 P.2d 904 (Colo. 1986); IDAHO: State v. Lang, 672 P.2d 561 (Idaho 1983); ILLINOIS: People v. Tisler, 469 N.E.2d 147 (Ill. 1984); IOWA: State v. Bousman, 387 N.W.2d. 605 (Iowa 1986); KANSAS: State v. Walter, 670 P.2d 1354 (Kansas 1983); MARYLAND: Potts v. State, 479 A.2d 1335 (Md. 1984), and Malcolm v. Maryland, 521 A.2d 796 (Md.Ct. Spec.App. 1987); MICHIGAN: People v. Chapman, 387 N.W.2d 835 (Mich. 1986); MISSISSIPPI: Lee v. State, 435 So.2d. 674 (Miss. 1983); NEW HAMPSHIRE: New Hampshire v. Bradberry, 522 A.2d 1380 (N.H. 1986); NORTH CAROLINA: State v. Arrington, 319 S.E.2d 1254 (N.C. 1984); PENNSYLVANIA: Commonwealth v. Gray, 503 A.2d 921 (Pa. 1985); WEST VIRGINIA: State v. Adkins, 346 S.E.2d 762 (W.Va. 1986); WISCONSIN: State v. Boggess, 340 N.W.2d 516 (Wis. 1983); and WYOMING: Bonsness v. State, 672 P.2d. 1291 (Wyo. 1983).

With the score only 16.5 at this time, with at least 29 States at this time not having gone on record, it is apparent to me that if we are counting the number of

States that have accepted Gates, supra, against the number of States that have rejected Gates, we are a long way off from hearing the "Fat Lady" sing in this area of the law.

It appears to me that, regardless of what the count may now be, or what it might ultimately be, if this Court is going to adhere to the doctrine of stare decisis, which in recent times is highly questionable for reasons I pointed out in the dissenting opinion that I filed in Brown v. State, 657 S.W.2d 797 (Tex.Cr.App. 1983), it should at least continue to subscribe to what this Court has stated and held in, for example, the following cases:

Ruiz v. State, 457 S.W.2d 894 (Tex.Cr.App. 1970), opinion by Judge Douglas, (Held, "in the present case, if the affidavit is construed to show that the information was furnished by Hewett by an informant (footnote omitted), then the following statement by the Supreme Court of the United States is applicable: 'Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,...the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were,..' Aguilar v. Texas, 378 US 108, 84 S.Ct. 1509, 12 L.Ed.2d 723. See Spinelli v. United States, 393 US 410, 89 S.Ct. 584, 21 L.Ed.2d

637." (895.); Powers v. State, 456 S.W.2d. 97 (Tex.Cr.App. 1970) opinion apparently by Judge Douglas, (Held, "the recitations in the affidavit that the affiant had been informed by reliable, credible and trustworthy citizens that appellants possessed marijuana are not sufficient. There are no underlying circumstances shown in the affidavit in the present case to inform the magistrate 'from which the informant concluded that the narcotics were where he claimed they were', as required by the Supreme Court in Aguilar. For this reason, the marijuana seized by virtue of the search warrant based upon the affidavit should not have been admitted into evidence." (98); Heredia v. State, 468 S.W.2d 833 (Tex.Cr.App. 1971), opinion authored by Judge Odom, (Held, "We note the recitations in the said affidavit that information 'from a reliable and credible informer who has furnished truthful and reliable information in the past' and 'This informer further stated that he had actually been inside this room' and had purchased heroin. Thus, the two-pronged test of Aguilar v. Texas, 378 US 108, 84 S.Ct. 1509, 12 L.Ed.2d 723, has been met. (834.) So, in order for the affidavit to show adequate probable cause it must set forth underlying circumstances necessary to enable the magistrate independently to judge the validity of the affiant's belief that heroin was being used and sold in motel room number 17 at the Frontier Motel. Spinelli v. United States, 393

US 410, 89 S.Ct. 584, 21 L.Ed.2d 637; Aguilar v. Texas, supra." (835.) Nicol v. State, 470 S.W.2d 893 (Tex.Cr. App. 1971), opinion authored by Judge Odom, in which "appellant attacks the sufficiency of the search warrant on the ground that the affidavit does not reflect adequate probable cause and sufficient 'underlying circumstances' to satisfy the requirements of Aguilar v. Texas, 378 US 108, 84 S.Ct. 1509, 12 L.Ed.2d 723." Held, "In determining the sufficiency of the aforementioned affidavit, we are bound by the four corners of that document." (894.) After examining the affidavit, this Court also held: "The information reflects no probable cause. It is conclusionary and supported by sufficient facts to satisfy the test of Aguilar, supra. (894.) "The test in Aguilar, supra, requires more. It requires that if the informer came by his information indirectly, the affidavit should explain why his sources were reliance. Spinelli v. United States, 393 US 410, 89 S.Ct. 584, 21 L.Ed.2d 637. (895.) The affidavit in the instant case supplies neither sufficient information as to the reliability of the informer's source nor sufficient description of the appellant's activities to satisfy these requirements. We conclude the affidavit to be insufficient. Spinelli v. United States, supra; Aguilar v. Texas, supra." For other cases in which very similar, if not identical, statements can be found therein, see Kemp v. State, 464

S.W.2d 141, (Tex.Cr.App.) (sic); Polanco v. State, 475 S.W.2d 763 (Tex.Cr.App. 1971); Stoddard v. State, 475 S.W.2d 744 (Tex.Cr.App. 1972); Lowery v. State, 499 S.W.2d 160 (Tex.Cr.App. 1973); Ashmore v. State, 507 S.W.2d 221 (Tex.Cr.App. 1974); Abercrombie and Dean, 528 S.W.2d 578 (Tex.Cr.App. 1974); Bridger v. State, 503 S.W.2d 801 (Tex.Cr.App. 1974); Caldarera and Walker, 504 S.W.2d 914 (Tex.Cr.App. 1974); Avery v. State, 515 S.W.2d 803 (Tex.Cr.App. 1977); Poindexter v. State, 545 S.W. 2d 798 (Tex.Cr.App. 1977); Kleasen v. State, 560 S.W.2d 938 (Tex.Cr.App. 1977); Gonzales v. State, 577 S.W.2d 226; Tolentino v. State, 638 S.W.2d 499 (Tex.Cr.App. 1982); Peltier v. State, 626 S.W.2d 30 (Tex.Cr.App. 1981); and Schmidt v. State, 659 S.W.2d 420 (Tex.Cr.App. 1983). It was in 1983, in Illinois v. Gates, supra, that the Supreme Court, for Fourth Amendment purposes, abandoned the "Aguilar/Spinelli two-pronged test" in favor of a "totality of the circumstances" approach, under which nebulous and amorphous standard the issuing magistrate is now to make only a "practical, common-sense decision where there is a fair probability" that the evidence sought will be found in the place to be searched. Thus, "[t]he task of the issuing magistrate [now] is simply to make a practical, common-sense decision whether, given all

the circumstances set forth in the affidavit before him, including the '"veracity"' and '"basis of knowledge"' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, supra, 103 S.Ct. at 2332. Therefore, I made my cut-off with the last case that I find that this Court decided before Illinois v. Gates, supra, was decided. Given what the above decisions of this Court have stated, I find it rather alarming for Judge McCormick to make the following statements: "Moreover, research indicates that this Court has never stepped forward to adopt affirmatively the two-pronged Aguilar/Spinelli test as THE method of assessing probable cause under the constitution and laws of the State of Texas. Finding valid precedent lacking, it is up to this Court to make a pronouncement as to the proper State model for assessing probable cause." (Page 5 of slip opinion.) To characterize the above decisions as "unsupported by authority and to be considered dicta" is, at a minimum, not only to carelessly, but to erroneously, belittle the authors of those opinions who in writing those opinions had no choice about the matter in that they were required by the provisions of Article III of the Federal Constitution to accept and apply, notwithstanding whatever their personal views might have been on the subject, the Supreme Court's decisions of Aguilar, supra, and Spinelli, supra.

It is true, of course, that had the author had a choice, he might have rejected that test. The point is that none of them had any choice about the matter because of the provisions of Article III of the Federal Constitution. Today, however, this Court has a choice to be the leader of an independent judiciary of this State, or to simply become a mimic or court jester for the Supreme Court of the United States.

---

2 The Supreme Court also reversed this Court's decision of Etchieson v. State, 390 S.W.2d (Tex.Cr.App. 1963), which had held that an affidavit which only stated that the belief of the affiant was based on the following was sufficient. "I have been informed of the existence of the foregoing set out ... by a reliable, credible, and trustworthy citizen of Dallas, Dallas County, Texas." See Etchieson v. Texas, 376 US 589, 84 S.Ct. 1932 (1964), which merely cited Aguilar v. Texas, supra. The Supreme Court also reversed this Court's decision of Barnes v. State, 372 S.W.2d 690 (Tex.Cr.App. 1964), which had approved an affidavit for a search warrant which did not set out any basis for the affiant's belief and simply stated that the affiant believed that inside of the premises sought to be searched was unlawfully obtained money. The Supreme Court reversed, see Barnes v. Texas, 380 US 253,

85 S.Ct. 942, 13 L.Ed.2d 818 (1965), merely citing Giordenello v. United States, supra, and Aguilar v. Texas, supra, as its authority.